Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Nobuo Hirai, Petitioner,

v.

Ryoko Ito, as Personal Representatives of the heirs of Akinobu Ito, Deceased, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October, 1994

QUESTIONS PRESENTED

1) Whether Federal Question Jurisdiction arises under the due process clauses of the 5th and 14th Amendments when the trial court, for docket convenience, refused to hear, but denied, defendant Hirai's motion to enforce a written settlement agreement.

2) Whether Federal Question Jurisdiction arises under the due process clauses of the 5th and 14th Amendments where the CNMI Supreme Court directed a judgment against defendant Macro for the first time on appeal, although it had been dismissed earlier, and was not present at trial.

3) Whether Federal Question Jurisdiction arises under the due process clauses of the 5th and 14th Amendments where defendant Hirai has not been granted a new trial despite the fact that another party defendant, Macro, is entitled to a new trial.

LIST OF PARTIES

The parties to the proceedings below were:

Plaintiffs: Ryoko Ito, as Personal Representative of the heirs of Akinobu Ito, Deceased. (Hereinafter "Ito.")

Defendants: Macro Energy, Inc., (herinafter "Macro"), Marianas Ocean Enterprises, (hereinafter "MOE"), Nobuo Hirai, (hereinafter "Hirai"), Shigemi Yamagishi, (hereinafter "Yamagishi"), and American Home Assurance Company, (hereinafter "American Home.")

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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Nobuo Hirai, Petitioner
v.
Ryoko Ito, as Personal Representatives of the
heirs of Akinobu Ito, Deceased, Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 9th Circuit, first entered in this case on July 21, 1994 based solely upon a finding that no federal question jurisdiction arose, where the trial court refused petitioner Hirai a hearing on Hirai's defense of a written settlement agreement, and the Supreme Court for the Commonwealth of the Northern Mariana Islands (CNMI) sustained the trial court's ruling, holding that the a trial court can refuse to hear a defense at trial which would be more conveniently heard before trial.

Petitioner further prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 9th Circuit, that no federal question jurisdiction arose on the due process issue of a right to a hearing and trial, where the CNMI Supreme Court imposed a 2.4 million dollar judgment against Macro, a party previously dismissed and therefore not present at trial, on the stated and patently inadequate grounds of ***respondeat superior***.

Petitioner further prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 9th Circuit, that no federal question jurisdiction is created by the fact that a new trial for

Macro, to which it is entitled, necessitates a new trial for all parties to avoid the threat of inconsistent judgments within the very same action

OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals (App., *infra*, T1-T3)is unreported. The opinion of the Supreme Court of the Commonwealth of the Northern Mariana Islands, (App., *infra*, K1-K50), is reported as *Ryoko Ito v. Macro Energy, Inc. et al.*, No. 92-022 CNMI, (October 26, 1993.)

JURISDICTION

The United States Court of Appeals entered its judgment on July 21, 1994. (App., *infra*, T1-T3.) The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND TREATIES

The Fifth Amendment of the United States Constitution provides, in pertinent part that "no person may be deprived of life, liberty, or property without due process of law."

The Fourteenth Amendment of the United States Constitution provides, in pertinent part, that " no state may deprive any person of life, liberty, or property without due process of law."

48 USC §1694c(a) provides that the 9th Circuit has jurisdiction of appeals from the Supreme Court of the Commonwealth of the Northern Mariana Islands "involving the constitution, treaties, or laws of the United States."

The Covenant to Establish a Commonwealth of the Northern Mariana Islands (CNMI) in Political Union with the United States of America (The Covenant), Article Five, §501(a) provides in pertinent part, "to the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several states....Amendments I through IX, inclusive;....Amendment XIV...."

STATEMENT OF THE CASE

I. Nature Of The Case

This is a wrongful death lawsuit filed by Ryoko Ito, as personal representative of the heirs of Akinobu Ito, (Ito), who died in a September 24, 1988 scuba diving accident at a popular Saipan dive site known as the "Grotto". (App., *infra*, A1-A3.) Plaintiffs' claims were originally brought against five (5) defendants: Macro, a dive shop, Hirai, an assistant instructor employed by Macro, Yamagishi, a scuba diving instructor and Macro's president, Marianas Ocean Enterprises (MOE), alleged to be the alter ego of Macro, and American Home Assurance Company (hereinafter "American Home") Macro and Yamagishi's insurer. (App., *infra*,A1-A7.)

II. Course Of Proceedings

On November 7, 1990, Macro, Hirai, Yamagishi, and American Home moved for summary judgment under §496B of the Restatement of Torts, 2d on the basis of an "Agreement for Exemption from Obligation" (i.e., a release agreement sometimes called a "covenant not to sue" or a "waiver of liability") signed by Ito on the morning of his accident (ER 1; 71; CR 11/7/90, 00:00:00).

On December 17, 1990, Judge Robert A Hefner in the CNMI Superior Court granted summary judgment in favor of Macro, Hirai, Yamagishi, and American Home. (App., *infra*, C-1.) The court did not address MOE in the judgment, or its Memorandum Decision, but the implication was that it too was dismissed. (App., *infra*, D1-D10.)

On December 27, 1990, plaintiff moved for reconsideration of the order granting summary judgment arguing that Ito's assumption of risk was not sufficiently "expressed" under §496B of the Restatement of Torts, 2d (App., *infra*, E1.)

On January 28, 1991, the Court entered an "Amended Summary Judgment" and "Memorandum Decision." (App., *infra*, E1.) Judge Hefner held, upon further review that although the agreement effectively operated to release Macro from liability, it did not release Yamagishi or Hirai, Macro's employees, since they were not named in the express assumption of risk. Since MOE was alleged to be the alter ego of Macro,

MOE along with Macro was dismissed. Although the status of American Home was unclear, the case was reinstated against it as well.

On June 21, 1991, plaintiff's counsel sent a written settlement offer to Hirai. The proposal was simple and short:

> This will constitute plaintiff's offer to the defendant Nobuo Hirai to dismiss the case with prejudice against him under the following conditions:
>
> a) Hirai will meet with a [sic] expert of plaintiff's choosing to discuss the events surrounding this case and his employment in Saipan.
>
> b) Hirai agrees to testify at the trial. [App., *infra*, F-5.]

Four days later, Hirai's counsel sent plaintiff's counsel a written acceptance, signed by both counsel and Hirai, that was similarly simple and short:

> My client, NOBUO HIRAI, unconditionally accepts the offer to settle the case against him contained in your letter of June 21, 1991 under the terms specified therein. (App., *infra*, F-6.)

On June 26, 1991, the following day, plaintiff's counsel purported to orally revoke the offer, and a day later, on June 23, 1991, sent a letter purporting to withdraw it. (App., *infra*, F-7.)

Despite their executed settlement agreement, plaintiff did not file a dismissal of Hirai. Accordingly, on September 12, 1991, Hirai filed a Motion for Summary Judgment on the basis of the settlement agreement. No opposition was ever filed. However, the parties stipulated to a stay of the hearing until the matter was finally brought up for hearing on the first day of trial on May 26, 1992. (App., *infra*, I2-I4.) At that time, the court stated that this matter should have been taken up before trial and rather than hear the Motion, the court denied the Motion. (App., *infra*, I-4.)

On September 9, 1991, American Home moved, pursuant to Rule 54(b) of the CNMI Rules of Civil Procedure, (adopted from the Federal Rules) for certification of the Superior Court's January 28, 1991 Amended Summary Judgment on the "release issue", and for certification of the court's April 16, 1991 order on the policy limits issue.

On September 12, 1991, Hirai filed a motion to enforce the settlement agreement.

On October 7, 1991, the trial court certified for appeal Judge Hefner's order of January 28, 1991 on the release issue and Judge Hefner's order of April 16, 1991 on the policy limits.

The notices of appeal which followed the Rule 54(b) certification had the effect of staying all proceedings in the Superior Court, including Hirai's motion to enforce the settlement agreement. On November 6, 1991, the parties formally stipulated to such a stay.

On February 3, 1992, the CNMI Supreme Court dismissed all of the appeals on the grounds that the orders sought to be reviewed were insufficiently final within the meaning of Rule 54(b).

On February 7, 1992, plaintiff scheduled Hirai's second deposition for March 5, 1992.[1] Hirai was re-deposed by plaintiff two days later on April 9, 1992. On February 17, 1992, the parties stipulated to a May 26, 1992 trial date.

On April 7, 1992, a hearing was held on various pretrial motions defendants. Judge Castro declined to entertain the motions on their merits, denying them on the grounds that they had been filed too close to trial, then over a month and a half away. (App., *infra*, 11-15.) No motion cut off date had ever been set by the court.

On May 22, 1992, defendants filed their Pretrial Memorandum, in which they noted that Hirai's Motion to Enforce the Settlement Agreement was still pending. Defendant Hirai requested that the motion be heard prior to trial or on the day of trial prior to testimony. (App., *infra*, 13-14.)

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[1] Shortly after the motion to enforce the settlement had been filed, plaintiff's counsel and counsel for Mr. Hirai agreed that the hearing on the motion would be postponed until plaintiff's counsel could re-depose Mr. Hirai (CR 10/9/92 8:2:42, RT 5/26/92 11:13-24).

The motion memorandum and affidavit in support of Motion to Enforce the Settlement were filed with the Pretrial Memorandum.

On May 26, 1992, on the first day of trial, just before opening statements, the trial court refused to hear Hirai's motion on his settlement agreement and denied it without a hearing on the grounds that it should have been raised prior to trial. (App., *infra*, I1-I4.)

On June 22, 1992, after a two week trial between May 26, 1992 and June 5, 1992, the court entered judgment in the approximate amount of $2.4 million against Hirai, Yamagishi and American Home. (App., *infra*, G1.) On August 10, 1992, after American Home's June 29, 1992 Motion to Alter or Amend the Judgment was entered which limited American Homes' liability to $100,000. (App., *infra*, H1-H2.)

Yamagishi and Hirai's Joint Notice of Appeal to the CNMI Supreme Court was timely filed on August 14, 1992. On September 22, 1992, the CNMI Supreme Court consolidated the appeals and set the briefing schedule. The CNMI Supreme Court heard argument on the island of Saipan on March 12, 1993.

On October 26, 1993 the CNMI Supreme Court issued its written Opinion wherein it decided, *inter alia*:

> Hearing the motion [to enforce a written settlement agreement] would have entailed continuing the trial to another day. A continuance would have required a shifting of the court's docket. (App., *infra*, K32.)

Thus, quite surprisingly, the CNMI Supreme Court elevated the importance of docket control above the right to a hearing, guaranteed by the due process clauses of the 5th and 14th Amendments.

The CNMI Supreme Court also made a decision to impose the judgment against Macro, a party which had previously been dismissed from the case months before trial. The CNMI Supreme Court's only reason for imposing judgment against a previously dismissed party without a trial was "*respondeat superior*." (App., *infra*, K22; M1-M2.)

On November 3, 1993, Hirai filed a motion for rehearing with the CNMI Supreme Court, explaining that docket control may not supersede

the right to a hearing. Hirai also noted that the doctrine of *respondeat superior* does not substitute for the right to a trial. (App., *infra*, L1-L3.)

The CNMI Supreme Court denied a rehearing on November 23, 1993 on the grounds that Hirai had not raised the due process problems with the CNMI Supreme Court decision until after the decision was written. (App., *infra*, M1-M2)

The CNMI Supreme Court also denied a rehearing on the issue of entering judgment against the previously dismissed Macro without trial. The Court based its ruling on the grounds that Macro failed to set forth facts (at the appellate level and without a trial) to show that its employee Yamagishi acted outside the scope of employment. (App., *infra*, M1-M2.)

On December 22, 1993, Hirai filed a Notice of Appeal with the United States Court of Appeals for the 9th Circuit. Hirai fully briefed the issues set forth above. (App., *infra*, O, P, Q, R and S.)

On July 21, 1994 the United States Court of Appeal for the 9th Circuit entered judgment against Hirai. The Court of Appeals based its ruling on the sole grounds that the above proceedings failed to raise an issue of Constitutional Due Process such as to create Federal Question Jurisdiction. (App., *infra*, T1-T3.)

III. How Federal Questions Were Raised In The Courts Below

Hirai first requested a hearing on his defense of a written settlement agreement at the trial. (App., *infra*,I1-I4.) Hirai then argued before the CNMI Supreme Court (the only appellate court in the CNMI) that he had a right to a hearing on this defense. (App., *infra*, J2-J5.) Surprised by the CNMI Supreme Court's decision that he had no right to a hearing, Hirai filed a motion for rehearing in the CNMI Supreme Court. (App., *infra*, L6-L13.) The Court denied Hirai's motion on the grounds that Hirai had not pointed out to the CNMI Supreme Court before that the right to a hearing is guaranteed by due process clauses of the Constitution. (App., *infra*, M-2.)

In its' Order Denying a Rehearing, the CNMI Supreme Court dismissed Hirai's due process rights in two sentences:

> Hirai's due process argument regarding the issue of the settlement agreement is

> being raised for the first time in his Petition for Rehearing. We shall not address this issue which was not raised below or earlier with us. [App., *infra*,M-2.]

This statement is incorrect. Hirai requested a hearing. The trial court denied that request. Hirai then appealed to the CNMI Supreme Court on the grounds that he had been denied a right to a hearing during the trial. These facts constitute raising the due process issue.

The CNMI Supreme Court ruled that the trial court had a right to deny Hirai a hearing on his settlement agreement at trial in the interest of "docket control."

> The trial court possesses inherent power to police its docket, *Oliva v. Sullivan,* 958 F.2d 272 (9th Cir. 1992); *Edwards v. Cass County, Tex*, 919 F.2d 273 (5th Cir. 1990). The timing of trials and docket control are matters best left to the discretion of the trial court. *Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329 (9th Cir. 1985), *corrected by*, 773 F.2d 1049. [App., *infra*, K31-K32.]

Then the CNMI Supreme Court refused to even consider that this ruling amounted to a denial of the constitutional due process right to a hearing. (*Ibid.*) This amounts to a violation of due process in its most basic form: fairness and substantial justice.

At the trial court, as stated above, Hirai asked:

> if we can just have five minutes on that motion. because we thought the offer had been made and accepted...
>
> * * *
>
> If your Honor is willing to hear it today or at some point during the trial, we would like to argue it. If your Honor would

> prefer that it be a matter of proof at sometime during the trial, then that would be acceptable to us, too. [App., *infra*, I3.]

Hirai clearly requested a hearing and the court clearly denied him that right. One need not yell "due process" to raise the constitutional issue. When one asks for a hearing, one is requesting due process and raising the issue. Hirai did not waive the right to a hearing;. Hirai raised the issue by making the request.

At the appeal stage, Hirai's Opening Brief before the CNMI Supreme Court argued that Hirai's settlement agreement should have been heard and enforced. Hirai argued that the trial court committed error both procedurally in refusing to hear the issue at trial and substantively because the settlement agreement was valid.

> First, procedurally, a motion for summary judgment may be made at any time, including on the eve of, or even during trial. (Rule 56 Commonwealth Rules of Civil Procedure;[2] *Thrift v. Bell Lines, Inc.*, 296 F.Supp. 214, 217 (D.C.N.Y. 1967); *H.J. Hines Co. v. Beach-nut Lifesavers*, Inc., 181 F.Supp. 452, 459 (D.C.N.Y. 1960). Hirai's written settlement agreement entitled him to dismissal. Whether defendant sought dismissal based upon that contract before or during trial has no bearing on Hirai's rights under the contract. He certainly did not waive his rights under the settlement contract by failing to enforce it before the trial. Obviously, if settlement agreement can only be enforced by pretrial motion, no settlements would ever be entered into during a trial. Accordingly, the basis for the [trial] court's refusal to entertain defendant's Motion is unsound. [App., *infra*, J2-J5.]

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2 The Commonwealth Rules of Civil Procedure, including Rule 56, are based upon the Federal Rules of Civil Procedure.

Clearly, Hirai raised this issue "involving" due process in the initial stages of the appeal to the CNMI Supreme Court. The CNMI Supreme Court's ruling appears particularly disingenuous when one sees that the cases relied upon by the Supreme Court in its Opinion were never cited by the parties. Furthermore, those cases specifically address the due process problems inherent in elevating a trial court's power to control its own docket over a right to a hearing. (See discussion distinguishing cases cited by the CNMI Supreme Court at pp.19-21, *infra*.)

The CNMI's Supreme Court's conclusion that Hirai waived his due process right to a hearing or to raise the issue on appeal is incorrect and fundamentally unfair. "Court's indulge every presumption against the waiver or fundamental constitutional rights." (*Johnson v. Zerbst*, 304 US 458 (1938); *United States v. Williamson*, 803 F.2d 216, 219 (10th Cir. 1986).)

In sum, Hirai did raise this due process issue of a hearing in the trial court and in the initial stages of the CNMI appeal, despite the CNMI Supreme Court's conclusory statement to the contrary. Furthermore, even if there were any question as to whether Hirai waived his due process rights, there is a strong presumption against such a waiver (*Johnson, supra*).

Hirai first raised the issue of the right of Macrō, previously dismissed from the case, to a trial on the merits in his Respondent's Brief to Ito's Cross-Appeal in the CNMI Supreme Court. At that time Hirai specifically cited the due process clauses of the 5th and 14th Amendments.

Hirai first raised the issue of the right of Hirai to a new trial, to avoid the resulting threat of multiple judgments within the same action, in his Respondent's Brief to Ito's Cross-Appeal in the CNMI Supreme Court. At that time Hirai specifically cited the due process clause of the 5th and 14th Amendments.

Hirai appealed to the United States Court of Appeals based upon the constitutional due process violations discussed herein. The Court of Appeal committed error when it dismissed this appeal on the grounds that no federal issues were raised.

REASONS FOR GRANTING THE PETITION

I. Importance Of The Question

The United States Court of Appeals for the 9th Circuit decided that Hirai's colorable appeal, based upon a denial of a hearing on his best defense, the denial of a trial to a previously dismissed defendant, and the question of a right to a new trial as to the remaining parties, to avoid inconsistent judgments within the same action, did not raise a federal due process issue, such as would create federal question jurisdiction.

The citizens of the CNMI will understand this decision as a declaration by their own courts and the United States Court of Appeals that they do not have the right to due process guaranteed by the constitution of the United States.. The need for guidance from this Court is acute.

The United States Court of Appeals for the 9th Circuit and the citizens and courts of the CNMI should be advised by this Court that due process guaranteed by the Constitution of the United States and the Covenant will be enforced by the courts of the CNMI, and, if necessary, by the United States Court of Appeals.

Here there were clear violations of due process by both the Superior Court and Supreme Court of the CNMI. When the Superior Court of the CNMI denied defendant Hirai the right to be heard on his motion to enforce a fully executed settlement agreement, it was a clear denial of due process. When the CNMI Supreme Court sustained that decision, and further decided to impose the judgment upon Macro without a trial, and denied a new trial as to all parties to avoid inconsistent judgments within the same action, it also denied Hirai due process of law.

This issue of due process is a matter of importance to the people, courts and government of the CNMI, including Saipan. This decision, if not corrected, can create uncertainty within the citizenry, courts and government of the CNMI as to all constitutional rights. Uncertainty as to equal application of such fundamental rights threatens to create a climate which inhibits commerce, tourism and communication. Such uncertain and inconsistent application of the United States Constitution is also

certain to open the floodgates to the federal court system by those seeking clarification of their rights.

This case is a timely and rare opportunity for this Court to provide guidance to the citizens and courts of the CNMI and to bring much needed certainty and uniformity to the enforcement of these basic constitutional rights.

Whatever the resolution of these questions, they are federal questions involving the Constitution of the United States. The United States Court of Appeals for the 9th Circuit dismissed Hirai's appeal on the grounds that "this is not a case 'involving the Constitution, treaties, or laws of the United States...'." (App., *infra*, T-1, citing 48 USC §1694c(a) and *Sablan v Manglona*, 938 F.2d 970 (9th Cir. 1991.)) Thus, the 9th Circuit decision is based solely upon a finding that the above enumerated issues are not federal questions.

Article III, Section 2, of the Constitution provides that the judicial power of the United States extends to cases "arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority." The statutory grant of federal question jurisdiction also uses the phrase "arises under." (28 USC §1331.) Similarly, 48 USC §1694c(a) provides that the United States Court of Appeals for the 9th Circuit will have jurisdiction of appeals from all final decisions of the highest court of the Northern Mariana Islands from which a decision could be had in all cases "involving the Constitution, Treaties or laws of the United States."

The issue of when the relation of federal law to a case is such that the action may be said to "arise under" that law has historically been deceptively difficult.

As noted by Moore's Federal Practice and Procedure:

> **The meaning of this phrase has attracted the interest of such giants of the bench as Marshall, Waite, Bradley, the first Harlan, Holmes, Cardozo, and Frankfurter--to name only the dead. It has been the subject of voluminous scholarly writing. Even so it cannot be said that any clear**

> test has been developed to determine which cases "arise under" federal law. There is no single rational principle that will explain all of the decisions on this point. The problem has been aggravated by the tendency of courts to repeat uncritically language from earlier decisions as a substitute for analysis of the case that is actually before them. [Vol. 13B, J.Moore, A. Vestal & P. Kurland, Moore's Manual Federal Practice and Proceedure, §3562, pp.18-19 (1994.).]

This case represents a rare opportunity for this Court to establish clear guidelines as to when a case "arises under" federal law. It also represents an opportunity for this Court to remedy the clear error of the United States Court of Appeals.

II. Federal Question Jurisdiction Arises From Hirai's Colorable Appeal On The Grounds Of Denial Of A Hearing On A Written Settlement Agreement

On the first day of trial, counsel for Hirai asked to be heard on the plaintiff-Hirai settlement agreement stating:

> If we can just have five minutes on that motion, because we thought the offer had been made and accepted. [App., *infra*, I-3.]

The court repeatedly complained that a motion on the settlement agreement had not been heard before and that:

> Before you bring [this] up before the court, you have to notice this thing, and set it for hearing. (App., *infra*, I-4.)

Counsel for Hirai responded with a reasonable explanation for the delay of the hearing in light of the fact that certain issues on summary judgment had been certified under Rule 54(b). The certification and stay was made after the motion for summary judgment on the settlement

agreement was noticed but before the hearing. Thus, the action was stayed between the time Hirai's motion for summary judgment was originally filed and the date set for hearing. When the case was remanded back to the trial court after the CNMI Supreme Court dismissed the interlocutory appeal, the trial court instructed that it did not want to hear any more law and motion matters before trial. (App., *infra*, I3-I4.)[3]. Thus, Hirai waited until the pretrial briefs and the first day of trial to raise this issue.

Counsel for Hirai simply requested a hearing of this very important defense, if not on the first day of trial then at some time;

> If your Honor is willing to hear it today or at some point during the trial, we'd like to argue it. If your Honor would prefer that it be a matter of proof at some time during the trial, then that would be acceptable to us, too. But there is a reason for why it hasn't been heard yet, and that was scheduling difficulties, and an agreement of counsel that the hearing wouldn't go forward until Mr. Hirai's deposition could be retaken. (*Ibid.*)

The Court responded:

> We have about seven files this thick here, and these are matters that should have been taken up before trial. That's why I asked the parties, 'are you ready for trial?' Now, at this point, to entertain this motion, the court will not. . .will deny the motion. (App., *infra*, I-4.)

The trial court did not simply put off a hearing on this issue to a more convenient time. It "denied" enforcing the settlement agreement on the grounds that hearing the matter at trial was inconvenient. The court refused to hear Hirai's defense because it believed the matter should have been resolved in pretrial proceedings.

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[3] There was no law and motion cut-off, either by local rule or court order in this matter, other than Judge Castro's instruction that the court did not want to hear any more law and motion matters prior to trial. (App., *infra*, I3-I4.)

In the Supreme Court's opinion regarding the plaintiff-Hirai settlement agreement at pp. 34-35, the Supreme Court cited three cases for the proposition that the trial court possessed inherent power to police its docket and that the timing of trials and docket control are matters best left to the discretion of the trial court: *Oliva v. Sullivan* 958 F.2d 272 (9th Cir. 1992); *Edwards v. Cass County, Texas* 919 F.2d 273 (5th Cir. 1990; *Coursen v. A.H. Robbins Co., Inc.* 764 F.2d 1329 (9th Cir. 1985) corrected by 773 F.2d 1049.

However, these cases in no way support the trial court's refusal to allow a hearing of Hirai's strongest defense, a written settlement agreement. In *Oliva v., Sullivan, supra*, the Ninth Circuit Court of Appeals held that the District Court abused its discretion when it put its inherent power to control its docket ahead of the rights of the parties to be heard on the merits. In that case, the local rules and the trial court's instructions provided that plaintiff should have filed a motion for summary judgment by August 6, 1987. Plaintiff did not do so. Accordingly, the trial court dismissed the action. The Court of Appeal held that plaintiff was entitled to a hearing and reversed, holding:

> ...the public policy favoring disposition on the merits weighs against dismissal. (*Oliva* at p. 274.)

Oliva certainly does not stand for the proposition that parties such as Hirai may not have their defenses heard on the merits at the whim of the trial court.

In *Edwards v. Cass County, Texas, supra*, once again, the holding does not support the trial court's decision to deny a motion on the grounds that it refused to hear it. In *Edwards*, the trial court refused to hear an untimely motion for summary judgment. The defendant and moving party filed an interlocutory appeal. The Court of Appeal held, simply, that an interlocutory appeal was not proper, and that the defense should properly be raised as Hirai's defense was raised: at trial. The court held:

> **Having failed to take the appropriate measures to test the legal issue of immunity [the basis of the motion for summary judgment] prior to trial, these defendants must stand trial, unless on**

> remand the district court should elect to consider their motion for summary judgment and should determine that qualified immunity is present.
>
> **Out of an abundance of caution, however, we note that the defendants still may assert qualified immunity at trial.** (*Edwards* at p.277; emphasis added.)

In the case at bench, the defense was presented at trial. This is not an interlocutory appeal. This is an appeal after a trial in which the trial court refused to hear petitioner Hirai's defense.

The third case cited by the Supreme Court on this issue is *Coursen v. A.H. Robbins, Co., Inc.*, 764 F.2d 1429 (9th Cir. 1985) corrected by 773 F.2d 1049. The appellant there contended that she was prejudiced because the trial court rescheduled her trial from February 14, 1984 to February 10, 1984. The court stated broadly that:

> The timing of trials and control of the docket are matters left to the discretion of the trial court. (*Coursen* at p. 1340)

That case stands for the proposition that a trial court may control the timing of its trials and control the docket. It does not stand for the proposition that if a party presents a defense at an inconvenient time, the defense may simply be "denied". Once again, the *Coursen* case, like *Edwards*, *supra* and *Oliva*, *supra* cited by the CNMI Supreme Court, does not support the trial court's summary denial of petitioner Hirai's best defense.

Due process of law under the 5th and 14th Amendments to the United States Constitution requires that parties have an opportunity to defend, enforce, and protect their rights. The guarantee of due process of law is one of the most important to be found in the Constitution, and it has been said that without such guarantee, the right of private property could not be said to exist in the sense in which it is known to our laws. (Ochoa v. Hernandez 230 US 139 (1913).) Due process is not interested in mere technical formalism. It is, rather, the substance that is determinative of whether due process has been afforded. It is not a technical conception

with a fixed content unrelated to time, place, and circumstances, but rather expresses the requirement of fundamental fairness. (*Lassiter v. Department of Social Services* 452 US 18 (1981).)

One of the essential elements of procedural due process is an opportunity for hearing. It is a cardinal principal of due process that no one may be bound by a judgment, either in respect to his or her person or property unless that person has had his or her day in court. In other words, a person may not be so bound until he or she has been afforded an opportunity to be heard. As the United States Supreme Court has stated:

> The right to a hearing …is one of the 'rudiments of fair play'…assured…by the 14th Amendment …There can be no compromise on the footing of convenience or expediency…when that minimal requirement has been neglected or ignored. (*Ohio Bell Telephone Co. v. Public Utilities Com.* 301 US 292, 304-305 (1937).

In the case at bench, the trial court denied Hirai's right to a hearing on his strongest defense "on the footing of convenience or expediency". (*Ohio Bell, supra.*) It is difficult to imagine a clearer case of denial of due process and abuse of discretion. Yet the United States Court of Appeals dismissed on the grounds that no federal issue of due process was involved.

III. Federal Question Jurisdiction Arises From Petitioners' Colorable Appeal On The Grounds That Macro Is Entitled To A Trial On The Merits

In this case, Macro was dismissed by summary judgment and therefore was not present at trial. Nevertheless, the CNMI Supreme Court entered judgment for the first time on appeal against Macro on the theory of "*respondeat superior*." In a Motion for rehearing Hirai and Macro pointed out that it was a denial of due process for CNMI Supreme Court to act as a fact finding body and impose a judgment upon a previously dismissed party, without a trial.

The CNMI Supreme Court denied the motion for Rehearing stating:

> In particular, Macro's contention that its due process rights were violated is without merit. While it is true that a corporation is a distinct 'jural entity,' we disagree with the assertion that Macro is entitled to a full trial on the issues of negligent conduct, liability and damages before judgment may be entered against it, for here, it was being sued on *respondeat superior* grounds. (App., *infra*, M-1.)

Defendant has found no cases where the doctrine of respondeat superior has been extended to impose a judgment upon a party without a hearing. Using this reasoning parties could simply prosecute an action against employees and then impose judgments thus obtained upon employers who are not parties to the trial, on a *respondeat superior* theory.

It is fundamental that a judgment does not apply to one who is not a party at trial. In her brief before the CNMI Supreme Court, plaintiff argued that the doctrines of coliateral estoppel and privity should be applied to this novel situation.

Of course, the typical situation for application of these doctrines is a case in which plaintiff has obtained a judgment against a defendant, and then sues on that judgment in a second action against the defendant's insurance company who paid for and controlled the defense in the first action. In those cases, the trial court has the discretion to apply the principals of collateral estoppel and privity so as to prevent re-litigation of the same issues.

In this case, however, plaintiffs are not attempting to sue defendant's insurance company on the judgment against its insured. Instead, plaintiffs are attempting to impose a judgment obtained against employees upon an employer who was previously dismissed and not a party at trial. Macro and MOE certainly cannot be said to have controlled this action or to have reasonably expected to be bound by this judgment as they had already been adjudicated to have no liability and were dismissed.

The question of whether the doctrines of privity and collateral estoppel apply to a case are questions of fact for the trial court (*Areajet v.*

Askew (1975) 511 F.2d 710, 719). It was not appropriate for the CNMI Supreme Court to usurp the trial court's power to decide these issues of fact and summarily deny Macro its right to a trial on the merits.

The CNMI Supreme Court does not indicate whether it adopted plaintiffs arguments regarding privity and collateral estoppel. However, if it did so, it did so in error. (1) Collateral estoppel is not applicable where a case involves only one action. (*Lytle v. Household Manufacturing* (1990) 494 US 545). The threat of multiple lawsuits, prevention of which is the purpose of collateral estoppel, is not a danger here. (2) Collateral estoppel should not be imposed offensively against on who is not a party to the original trial. (*Whittler v. Seibel* (1982) 675 F.2d 245). (3) Privity in the collateral estoppel context can only be found where the party in privity reasonably expected to be bound by the earlier decision (Restatement of Judgments, 2d §39) and controlled the earlier lawsuit (*Drier v. Tarpon* 522 F.2d 199 (5th Cir. 1975). In this case, on the contrary, Macro was specifically adjudicated to have no liability and it cannot be said to have controlled the earlier lawsuit from which they were dismissed; it was not present at trial.

The United States Court of Appeal committed error in failing to recognize that imposing a $2.4 million judgment against a party dismissed months before trial raises an issue of constitutional due process.

IV. Federal Question Jurisdiction Arises From Hirai's Colorable Appeal On The Grounds That Hirai Has Not Been Granted A New Trial Despite The Fact That Another Party Defendant Is Entitled To A New Trial

It is fundamental that a judgment is not final with respect to any defendant if it is not final with respect to all defendants. Commonwealth Rule of Civil Procedure 54(b) which is adopted from Rule 54(b) of the Federal Rules of Civil Procedure provides:

> ...Any order or other form of decision, however it is designated, which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of

judgment adjudicating all the claims or rights and liabilities of the parties.

Accordingly, a new trial against Macro necessitates a new trial for Hirai also. This is the only way to prevent inconsistent findings of fact and conclusions of law in a single judgment. Since the judgment is joint and several, it cannot be based upon inconsistent findings with respect to different parties within the same judgment.

The threat of inconsistent judgments within the same action not only violates the Rules of Civil Procedure, it also violates due process. The effect of inconsistent judgments is different treatment for different defendants within the same action. This would include the threat of different findings of fact with regard to negligence, liability, and damages, with respect to different defendants. Such a scenario is, of course, unheard of in the case law since it would be such a patent violation of due process.

As such, the threat herein of inconsistent judgments within the same action, should Macro receive the trial to which it is entitled, clearly raises a federal question. Thus the United states Court of Appeals committed error in not taking jurisdiction of this issue.

CONCLUSION

For the foregoing reasons, petitioner, appellant and defendant Nobuo Hirai respectfully requests that this honorable Court issue a writ of certiorari and direct the United States Court of Appeals to take jurisdiction of this matter on the grounds that the issues raised herein involve the Constitution; treaties, or laws of the United States under 48 USC §1694c(a).

DATED: October 15, 1994

Respectfully submitted,

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APPENDIX A

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IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Represenatative of the heirs of AKINOBU ITO, Deceased, Plaintiff, vs. MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI, AND AMERICAN HOME INSURANCE CO. Defendants.	CIVIL ACTION NO. **COMPLAINT**

JURISDICTION

1. This Court has jurisdiction persuant to the Commonwealth Judicial Reorganization Act of 1989.

2. This is an action for the wrongful death of Akinobu Ito hereinafter referred to as "Ito" brought by Ryoko Ito as the personal representative hereinafter referred to as Plaintiff, that occurred while Ito was on a scuba diving tour organized, supervised and under the complete control o Marianas Ocean Enterprises Inc., acting through its alter ego

Macro Energy, Inc. and employees and or offecers Shigemi Yamagishi and Nobuo Hirai.

3. Plaintiff Ryoko Ito is of age and the widow of the deceased and the mother of the two children of the deceased.

4. At all times relevant hereto defendant Macro Energy, Inc. (MEI) was a corporation organized and existing under the laws of the Commonwealth of the Northern Marianas, acting as the alter ego of defendant Marianas Ocean Enterprises, Inc.

5. At all times relevant hereto defendant Marianas Ocean Enterprises, Inc. (MOE) was a corporation organixzed and existing under the laws of the Commonwealth of the Northern Marianas.

6. At all times relevant hereto defendant Nobuo Hirai (Hirai) was employed by either MOE or MEI or both as a diving instructor and guide.

7. At all times relevant hereto, defendants Shigemi Yamagishi was an officer, director and/or employee of MOE and or MEI.

8. In June, 1989, the decedent Aki9nobu Ito enrolled in a scuba diving class conducted by the defendatns for the purpose of obtaining a license or certification as a scuba diver.

9. Defendants MOE and or MEI accepted compensation for and undertook to train Ito as a scuba diver.

10. Despite receiving compensation for and undertakin to train Ito as a scuba diver, the defendants were grossly deficient in the instruction which fell far below the standard accepted in the scuba diving industry as adequate for certification as a scuba diver.

11. In September, 1988, Ito, in the company of fellow employees returned to Saipan for the purpose of engaging in scuba diving.

12. Despite the fact that defendants were aware the Ito had had only the most rudimentary instruction in scuba diving, they accepted compensation to guide him on a scuba diving tour of a pladce known as the Grotto, a place suitable only for experiencecd divers.

13. Defendants also accepted compensation for the rental of scuba diving equipment which they warranted to be fit for its intended use.

14. The dive commenced and the divers all descended into theGrotto and proceeded through an underwater tunnel to the ocean outside.

15. Shortly thereafter, Yasuharu Fujitomi (Fujitomi) the dive partner of Ito signaled that he was out of air and rose to the surface. Ito and Hirai followed him up.

16. At the surface, Hirai found no air coming out of Fujitomi's rugulator and instructed him to descend breathing from Hirai's alternate air source known as an octopus.

17. The three descended and proceeded to the tunnel entrance to return to the Grotto pool.

18. At the entrance to the tunnel, Hirai checked Ito's air pressure gauge to determine how much air he had and the gauge read less than 500 pounds.

19. The three proceeded into the tunnel and shortly therafter Ito signaled thayt he had no air.

20. Hirai and Fujitomi proceeded through the tennel and emerged safely at the surface without Ito. Hirai then returned underwater and brough Ito to the surface and out of the water.

21. Cardio pulmonary resuscitation and mouth to mouth resuscitation was initiated to no avail and Ito was pronounced dead at the Commonwealth Health Center.

22. Plaintiff realleges and repeats each sand every allegation of paragraphs 1 through 21 of the complaint.

23. In June, 1988, Ito enrolled in a scuba diving instruction course and for a fee duly paoid to the defendants, the defendants agreed to furnish Ito with scuba diving instruction to enable him to obtain a scuba diving license and safely engage in the sport of scuba diving. Defendants had a duty to adequately instruct Ito so that he could safely engage in the sport of scuba diving.

24. In June, 1988, the defendants instructed Ito in scuba diving and awarded him a certification card assuring him that he was now adequately trained to safely engage in the sport of scuba diving.

25. Defendants failed to give the time and attention necessary to adequately train the decedemt and failed to give sufficient instruction or adhere to the standards of scuba diving instruction which would inhsure that Ito could safely engage in the sport of scuba diving.

26. Defendants' negligence included but is not limited to the followig:

(1) failing to hire competent instructors;

(2) failing to instruct Ito in emergency procedures;

(3) failing to instruct Ito in alternate air source breathing techniques;

(4) failing to provide sufficient classroom instruction; and

(5) failing to provide sufficient proctical instruction.

27. The above described negligence was a proximate cause of the death of Akinobu Ito and he was not contributory negligent.

28. As a direct and proximate result of the negligence of the defendants described herein, plaintiff Ryoko Ito, wife of desedent and the minor children of decedent Ito and Ryoko, all of whom were being supported by the decedent prior to the time of the injury, were deprived of the decedent's financial support and the children who lived with the decedent prior to the time of the injury were deprived of the help, company, love, affection and consortium of the decedent.

II

29. Plaintiff repeats and realleges each and every allegation of paragraphs 1 through 28.

30. Defendant Shigemi Yamagishi at all times relevant was an officer and or a director of defendant's MEI and/or MOE, defendant Hirai was at all times relevant an employee of MEI and/or MOE, at the time and place of the events relevant hereto the defendants and each of them, were members and engaged in a joint venture or common enterprise.

31. On September 22, 1988, Ito went to the dive shop of MEI and/or MOE for the purpose of obtaining a guide for a scuba diving tour and renting scuba diving equipment and for menetary consideration, duly paid by Ito, defendants agreed to rent him scuba diving equipment, and suggested that he join a scuba diving tour that was diving the Grotto, promising to provide a guide who would give his time and attention to insure a safe dive.

32. The defendants each and all of them were negligent in discharging their duty to the decedent in the following respects:

(1) in recommending a scuba dive that was suitable only for advanced divers and far above the ability of the decedent, which was known to them.

(2) providing incompetent guides.

(3) failing to provide adequate safety instructions.

(4) providing defective equipment which both leaked air and provided the decedent with a false reading of the amount of air left remaining to him.

(5) failingto follow proper safety and emergency procedures during the dive.

33. The above described negligence was a proximate cause of the death of Akinobu Ito, and he was not contributory negligent.

34. As a direct and proximate result of the negloigence of the defendants described herein, plaintiff Ryoko Ito, wife of decedent and the minor children of decedent Ito and Ryoko, all of whom were being suppoprted by the decedent prior to the time of the injury, were deprived of the decedent's financial support and the children who lived with the decedent prior tothe time of injury were depr4ived of the care, guidance, support, love, and affection of the decedent and plaintiff Ryoko Ito, the

wife of the decedent was deprived of the help, company, love, affection and consortium of the decedent.

III

35. Plaintiff realleges and repeats each and every allegation of paragraphs 1 through 34 of the complaint.

36. On or about September 22, 1988, defendnts were each and all of them insured by a public liability insurance policy issued by American Home Insurance Company covering liability and damages caused during the operation of their scuba diving instruction and tours.

37. Pursuant to the coverage contained in the said insurance policy and pursuant to the laws of the Commonwealth of the Northern Mariana Islands, plaintiff is entitledj to maintain a direct action against defendants American Home Insurance Company and to recover against said insurance carrier in an amount equal to any judgment recovered against defendants.

IV

38. Plaintiff realleges and repeats each and every allegation of paragraphs 1 through 37 of the complaint.

39. Defendant MEI is and at all times mentioned was the alter ego of defendant MOE, and there exists and at all times herein mentioned had existed, a unity of interest and ownership between defendants such that any separateness between them has ceased to exist,in that defendant MOE completely controlled, dominated, managed, and operated both corporate defendants and intermingled the assets of each to suit the convenience of MOE by intermingling the funds of both companies and failing to observe any corporate formalities or have any separate accounts or meetings.

40. Defendant MOE operated its business through its alter ego MEI in order to avoid potential liability and to avoid creditors, and all claims of corporate separateness are a sham.

41. Defendants MEI and MOE are both responsible for the acts alleged herein.

WHEREFORE, Plaintiff prays for judgment against Defendants individually, jointly and severally as follows;

1. For general damages according to proof.

2. For damages as alleged above by the widow for loss of maintenance, support, counsel and affection in an amount to be determined at trial;

3. For damages and loss as described above for the two children, in an amount to be determined at trial;

4. For costs and attorney's fees due to the gross and negligent conduct of the Defendants in causing the death of the Akinobu Ito.

5. For such other and further relief as the Court may deem proper.

Dated this 14the day of September, 1989.

FITGERALD, HERALD & BERGSMA
Attorneys at Law

William M. Fitgerald

APPENDIX B

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANAS

RYOKO ITO, as Personal Representative of the heirs of AKINOBU ITO, Deceased, Plaintiff, vs. MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI, and AMERICAN HOME INSURANCE CO., Defendants.	) CIVIL ACTION NO. 89-918) ANSWER

COMES NOW Defendants, Macro Energy, Inc., Nobuo Hirai, Shigemi Yamagishi, and American Home Assurance Co., severing themselves from the other Defendant named herein and answer that Complaint filed against then an follows:

1. Deny each and every allegation contained in paragraphs 10, 12, 13, 15, 16, 20, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 36, 37, 39, 40 and 41.

2. State, with respect to those allegations contained in paragraphs 2, 3, 4, 5, 8, 9 and 11, that answering Defendants do not have sufficient information and belief with which to admit or deny the allegations contained in said numbered paragraphs and based thereon deny each and every allegation contained in said paragraphs.

3. Answering Defendants hereby answer the allegations incorporated by reference by paragraphs 22, 29, 35 and 38 by incorporating the answers previously furnished herein to those incorporated paragraphs as their answer to those paragraphs.

FIRST AFFIRMATIVE DEFENSE

The complaint herein fails to state a claim upon which relief may be granted and therefore should be dismissed.

SECOND AFFIRMATIVE DEFENSE

The deceased, Mr. Ito, prior to participating in the dive which is the subject matter of Plaintiff's complaint, executed and delivered to Defendant Macro Energy Incorporated a release in writing whereby the deceased Ito, released the Defendants and forever discharged then from the claims set forth in tire Complaint and from any and all claims against Defendants.

THIRD AFFIRMATIVE ACTION

If Plaintiffs' suffered any of the damages alleged in their complaint, the decedent assumed the risk of such injuries and damages are decadent's own voluntary assumption of the risk was the proximate cause of Plaintiffs' damages.

FOURTH AFFIRMATIVE DEFENSE

If Plaintiffs' suffered any of the damages alleged in their complaint, such damages were proximately caused by decadent's own negligence and Plaintiffs' cannot recover against Defendants for such damages.

FIFTH AFFIRMATIVE DEFENSE

If Plaintiffs' suffered any of the damages alleged in their complaint, such damages were proximately caused by decedent's own negligence which was greater than or equal to any allege negligence of Defendants (which negligence in hereby denied) which requires the dismissal of Plaintiffs' Complaint or the reduction of any recovery by Plaintiffs' by the percentage of cause negligence attributable to decedent.

SIXTH AFFIRMATIVE DEFENSE

If Plaintiffs' suffered any of the damages alleged in their complaint, such were caused and resulted from natural at unavoidable causes beyond the control of Defendants.

WHEREFORE, answering Defendants pray for relief as follows:

1. That the Complaint be dismissed with prejudice.
2. That Defendants recover their costs.
3. For such other and future relief as the Court may deem just and appropriate.

Respectfully submitted this 27th day of October, 1989.

MOORE, CHING, BOERTZEL & LAWLOR
A Professional Corporation
Counsel for Defendants Mack
Energy, Inc. , Nobuo Hirai
Shigemi Yamagishi and American
Home Insurance Co.,

By PAUL A. LAWLOR
A Licensed Employee

END B

APPENDIX C

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative of the heirs of AKINOBU ITO, Deceased, Plaintiff,	)	CIVIL ACTION NO. 89-918
v.	)	SUMMARY JUDGMENT
MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI, and AMERICAN HOME INSURANCE CO, Defendants.	)	

Pursuant to the Memorandum Decision entered this date;

IT IS ADJUDGED the plaintiff take nothing by her complaint against Macro Energy, Inc., Nobuo Hirai, Shigemi Yamagishil and American Home Insurance Co. Defendants are entitled to their court costs.

Dated at Saipan, MP, 17th day of December, 1990.

Robert A. Hefner, Presiding Judge

END C

APPENDIX D

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative of the heirs Of AKINOBU ITO, Deceased, Plaintiff, v. MACRO ENERGY, INC., MARIANAS) OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI, and AMERICAN HOME INSURANCE CO,) Defendants.	) CIVIL ACTION NO. 89-918) MEMORANDUM DECISION

FACTS /1/

In June of 1988, the decedent, Akinobu Ito became a certified scuba diver after successfully completing an instruction course sponsored by a Japanese scuba diving sanctioning organization know as "A.D.S. Japan" and taught by defendant Shigemi Yamagishi, president of defendant Macro Energy, Inc. (Macro) in Saipan. Ito's instruction included 10

/1/ These facts (except for those relating to Ito's initial visit to Saipan) are taken from defendants' memorandum in support of their motion for summary judgment, pp. 6-11. The plaintiff does not dispute these facts. See, plaintiff's memorandum in opposition to defendants' motion.

hours of classroom instruction, a minimum of 3 hours in the water with scuba gear and a written test. In the first session of the course, students are taught how to fit their masks and regulators and how to clear their ears and masks while wearing full scuba gear. The second session consists of diving, underwater stabilization, ascension, proper wearing of the gear and "buddy breathing." Ito was also taught how to make an "emergency ascent" in an "out-of-air" situation. The A. D. S. certification contains no restriction preventing certified divers from diving in caves or tunnels.

Upon completion of the certification course, Ito and his friend, Yosuhiro Fujitomi went on a guided dive of Saipan's Grotto without incident./2/

Several months later on September 24, 1988, Ito, and several of his friends including Fujitomi returned to Saipan and went to Macro to sign-up for a guided dive of Saipan's Grotto taking place that day. Macro's professional dive instructors, defendants Yamagishi and Nabuo Hirai, were to act as guides and supervise the dive.

While at Macro, Ito was asked to read and sign an "Agreement for Exemption from Obligation" (Exemption Agreement) included in an Application for Scuba Diving and Invoice

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/2/

The Grotto is a popular Saipan dive spot which is essentially a small pool surrounded by natural rock formations. Those diving the Grotto enter the pool and descend approximately 30 meters to the bottom and enter any of three tunnels leading to the open ocean.

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prepared by Macro. Ito signed and dated the Exemption Agreement. The terms of the Exemption Agreement were printed in both Japanese and English. The terms, as printed in English are reprinted verbatim as follows:

I submitted an application for participating
in the diving tour and or training program

to be conducted by your agency, I fully accept and understand that such a diving tour and training involves basic risk and danger. if we fail to abide by the rules and regulations set by the guides and instructors and, if we neglect the diving rules, we realize that we may risk our lives. All the risks that we may have during the period of stay here belong to each of us personally. In case of accident, causing injury or death to myself, I myself, my family, or inherited organization and other related personnel shall have no right to protest against nor to claim for damages. we hereby swear to abide by and act at the rules and instructions set by the guides and instructors. Also I am fully a grown up at law and I acknowledge the fact that I am fully qualified to sign this agreement, to verify the exemptions from all the claims for damages. All the items in this application are to be decided by the agreement, and I personally sign this document at my own will rather than someone directing me to sign this paper.

There were 15 divers, including Ito and his friends who were to be guided by Yamagishi, and Hirai at this particular dive at the Grotto. Ito rented his scuba gear from Macro. All of the divers assembled and inspected their scuba gear at Macro's shop before leaving for the Grotto. The equipment inspection included an air check of the tanks. Ito and his dive "buddy" Fujitomi complained about a noise coming from Ito's gear but this noise was determined not to be a problem by Hirai.

Upon arriving at the Grotto and after a briefing by Yamagishi, Ito and the other divers entered the Grotto's pool accompanied by Hirai and Yamagishi. At the surface of the pool, one of the group could not clear her ears and was told to remain on the surface. The remaining group members then descended to the bottom of the Grotto with Yamagishi in the lead and Hirai in the rear. The group entered the center tunnel of the Grotto, exited at the other end and proceeded to an area approximately 20

meters deep whereupon Yamagishi checked the group's air gauges. After the air check, the group proceeded back to the tunnel.

At this point, Hirai noticed Fujitomi having problems with his regulator and went to assist him. Fujitomi headed for the surface followed by Ito, despite Hirai's signals to remain below.

Upon reaching Fujitomi, Hirai gave him his main regulator and used one of the two spare regulators included in his gear for his own air supply./3/ At the surface, Hirai tested Fujitomi's regulator and found it difficult to breathe from. Hirai then gave Fujitomi the spare regulator and took

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/3/
Although it is unclear from the deposition testimony, at some point during the ascent to the surface, Hirai signalled to Yamagishi that things were "O.K." Upon receiving this signal from Hirai, Yamagishi took the remaining 12 divers back through the tunnel and up to the pool's surface.

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his own regulator back from Fujitomi The three divers then descended and headed back to the tunnel entrance. At this point Ito had between 400 to 500 pounds of air remaining in his tank while Hirai's own tank had approximately 1,500 pounds of air remaining. According to Hirai, Ito had, "plenty of air to return by."

Upon entering the tunnel with Fujitomi and Ito, Hirai began to pull himself along the tunnel wall with his right arm while holding Fujitomi with his left arm. At this point Ito was moving along the wall with Hirai and 'Fujitomi. Approximately midway through the tunnel, Ito signalled Hirai that he was out of air whereupon Hirai gave Ito his main regulator. After ensuring that Ito was breathing through the regulator, Hirai, now using the second spare regulator, continued along the wall. Hirai last confirmed Ito's presence at about 10 feet from the pool's surface. At the surface, Hirai discovered that Ito was not with him. Looking underwater, Hirai saw Ito hovering approximately 10 feet below. Hirai descended and brought Ito to the surface where efforts to revive him failed. The

Certificate of Death states the cause of death as "asphyxia due to drowning."

PLEADINGS

The plaintiff, Ryoko Ito, decedent Ito's wife, subsequently filed this wrongful death action as personal representative of the deceased. The complaint 31leged negligence on the part of Macro in two counts. The first count alleges that Macro failed to provide adequate instruction and train the decedent in the sport of scuba diving while the second count alleges a breach of Macro's duty to recommend a safe place to dive, provide competent guides and properly working equipment, and follow proper safety and emergency procedures during the dive. The third and fourth counts are drafted to extend liability to Marianas Ocean Enterprises (MOE) as the alter ego of Macro and American Home Assurance Co. as the insurer of Macro and MOE.

Defendants Macro, Hirai, Yamagishi and American Home Assurance Co. now move for summary judgment against the plaintiff maintaining that, as a matter of law, the Exemption Agreement bars the plaintiff's claim for all damages against the defendants, including those proximately caused by any negligence on their part.

SUMMARY JUDGMENT STANDARD

A summary judgment will be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Com.R.Civ.Pro. Rule 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986). To withstand a motion for summary judgment, the non-moving party must show that there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. 106 S.Ct. at 2511. The mere existence of a scintilla of evidence in support of a plaintiff's position will be insufficient. There must be evidence on which a jury could reasonably find for the plaintiff. 106 S.Ct. at 2512. In determining whether a genuine issue of fact exists, the court can only consider evidence which would be admissible and have probative force at trial. Colan v. Cutler-Hammer, Inc., 812 F.2d 357 (7th Cir. 1987).

DISCUSSION

At common law there was no cause of action for wrongful death; the right to bring such an action is strictly statutory. Flowers v. Hyatt, 1 CR 693 (C.T.C. 1983). The Commonwealth's wrongful death statute (7 CMC QQQQ 2101 - 2103 creates a cause of action for wrongful death in the Commonwealth. Pursuant to 7 CMC QQ 2101(a), the plaintiff, as personal representative of the decedent, is entitled to maintain this action and recover any damages to the extent that the decedent would have been entitled to maintain an action and recover damages for injuries had he not died.

Conceding the truth of the allegations of negligence contained in the plaintiff's complaint for purposes of this motion only, the defendants argue that the Exemption Agreement's language includes any acts of negligence by the defendants and thus operates as a bar to the plaintiff's cause of action.

In her opposition to the defendants' motion, the plaintiff first contends that the defendants misconstrue the waiver provisions of the Application of Scuba Diving and Invoice. She points cut that under the section entitled "Invoice" which appears at the bottom of the Application for Scuba Diving and Invoice, there is another waiver provision that is unsigned. This provision which is printed in English only, reads as follows:

> I, (sic) fully check the equipment and everything are (sic) confirmed. I, the undersigned not (sic) hold the Macro Energy, Inc. responsible nor liable any (sic) diving, fishing boating (sic) accidents. I will return the equipment ....

The plaintiff argues that the Exemption Agreement released the defendants from liability for inherent risks of diving generally, while the second, unsigned waiver specifically waives liability for defective equipment. Relying on the general rule of contracts holding that when a contract has two provisions, one general and one specific, the specific provision controls over the general provision, the plaintiff concludes that the second unsigned waiver provision operates to limit the scope of the Exemption Agreement, thus denying the defendants insulation from liability for negligent issuance of defective scuba diving equipment. This argument is without merit.

Assuming arguendo that the Application for Scuba Diving and Invoice is a contract between Ito and Macro,/4/

/4/
The court makes no finding on this issue.

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since Ito never signed the second waiver provision, it never became part of the "contract." As such, the plaintiff's cited contract rule is inapplicable. /5/

The plaintiff next attacks the Exemption Agreement itself, claiming that unless an agreement clearly and unequivocally provides for the release of another's negligence, that obligation will not be inferred. Charles Poe Masonry, Inc. V. Spring Lock Scaffolding Rental Equipment Co., 374 So.2d 487 (Fla. 1979). Citing Madison v. Superior Court, 250 Cal.Rptr. 299 (1988), the plaintiff maintains that the Exemption Agreement must specifically refer to the defendants' negligence in order to include such negligence within its waiver terms. The plaintiff has cited other cases which she claims support the above rule of law. See, O'Connel v. Walt Disney World Co., 413 So.2d 444 (Fla. 1982); Sivaslian v. Rawlins, 451 N.Y.S.2d 307 (1987). The defendants, on the other hand, have cited cases wherein it was held that a release did not have to specifically waive liability for negligence in order to bar claims based on negligence. See, Heil Valley Ranch, Inc. v. Sumkin, 784 P.2d 781 (Colo. 1989); Hewitt v.

/5/
The court notes that the Application for Scuba Diving and Invoice is distinctly divided into two parts, the first being the scuba application and the second being the invoice. At the hearing on the motion, defendants' counsel explained that the waiver provision in the invoice section would only be signed if the customer were renting equipment and diving on his own rather than as a member of a dive supervised by Macro, in which case the Exemption Agreement would be signed by the customer, as Ito did.

Miller 521 P.2d 244 (Wash. Ct.App. 1974); Trainer v. Azatlan Cycle Club, Inc., 442 N. W. 2d 626 (Wis. 1988).

While none of the above cited cases are controlling in the Commonwealth, they are instructive and, at the very least, indicate a split of authority on the issue of whether a release must specifically refer to negligent conduct in order to act as a bar to claims based upon negligence. At the very most, all of the cases are in agreement that a waiver of liability must be clear and unambiguous. In any event, Section 496 of the Restatement (Second) of Torts (1965) is dispostive and controlling on this issue./6/ Section 496 B provides:

> A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy.

By signing the Exemption Agreement, Ito acknowledged that "all the risks" that he would be exposed to on the dive were his alone. Moreover, Ito expressly agreed to forego all claims for damages in the event of a diving accident causing

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6/

In all proceedings, the rules of the common law, as expressed in the restatement of the law approved by the American Law Institute and, to the extent not so expressed as Generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary; provided, that no person shall be subject to criminal prosecution except under the written law of the Commonwealth. See 7 CMC QQ 3401.

his injury or death. Clearly, the unambiguously expressed intent of the parties to the Exemption Agreement was to extinguish liability. In signing the Exemption Agreement, Ito also acknowledged that he had read and fully understood its terms. Moreover, Ito understood that equipment failure was an obvious risk of scuba diving inasmuch as his training included what to do in "out-of-air" situations. Under these circumstances, it is reasonable to conclude, as a matter of law, that Ito expressly agreed to accept a risk of harm arising from the defendants' negligent conduct. Indeed, it is difficult to imagine any claim that Ito, or in this case, the plaintiff, could have brought that would not have been based on negligence. To construe the Exemption Agreement in any other manner would render it essentially meaningless.

The plaintiff begins her next argument by erroneously asserting that the defendants' motion rests on Hirai's belief that Ito died of a ruptured lung caused by holding his breath while surfacing, a violation of a basic diving rule. Proceeding on the false premise that the Exemption Agreement operates to relieve the defendants of liability only if Ito violated a diving rule the plaintiff asserts that Hirai is unqualified to assert a medical opinion of Ito's death. The plaintiff then concludes that the defendants have failed to show that Ito violated a diving rule, thus precluding the Exemption Agreement from serving as a basis for summary judgment.

While the defendants' statement of facts did include Hirai's hypothesis as to the cause of Ito's death, the defendants also stated that for our poses of their motion, it made no difference how Ito died (Defendants' Memo. at p. 12). The defendants further slate that their motion rests upon Ito's knowing, voluntary and express waiver of his right to sue for damages in the event of his injury. Since the court's interpretation of the Exemption Agreement necessarily compels its rejection of the plaintiff's interpretation of the Exemption Agreement that is a premise of plaintiff's argument now under discussion, there is no need to consider the argument further.

Finally, the plaintiff argues that even if the Exemption Agreement applies to the defendants' negligent acts, it does not release them from those acts constituting willful and wanton misconduct. willful or wanton misconduct falls between simple negligence and an intentional tort and is sufficient where an actor knows, or has reason to know, of circumstances which would bring home to the realization of the ordinary reasonable person the highly dangerous character of his conduct. Liberty Furniture v. Sonitrol of Spokane, 770 P.2d 1086 (Wash. Ct.App. 1989).

Because a determination of whether conduct in a particular case constitutes willful and wanton misconduct is greatly dependent upon the particular facts of each case, it is generally within the peculiar province of the jury to consider whether the actor's conduct can be so designated. 57A Am.Jur.2d, Negligence, QQ 307. Where, however, there is insufficient evidence regarding an element of the pertinent type of conduct, the issue should not be submitted to the jury. Id.

The plaintiff relies, to a large extent, on the statement of Robert Campbell, who tested Ito's equipment after the accident (see, Campbell Statement attached to Hirai's dep.) and Hirai's deposition testimony to raise the issue of the defendants' willful and wanton misconduct. Since Campbell's statement is not in affidavit form as required by Rule 56, its contents will not be considered by the court. Colan v. Cutler-Hammer, Inc., 812 F.2d 357 (7th Cir. 1987). Moreover, even if the Campbell statement were admissible and considered with plaintiff's cited Hirai deposition testimony in the light most favorable to the plaintiff, this evidence would be, as a matter of law, far short of that which would require its submission to a jury on the issue of willful and wanton misconduct.

In summary, the court concludes as a matter of law that under any fact scenario plaintiff advocates as a basis for her wrongful death action against the movants, the Exemption Agreement signed by Ito bars recovery.

Dated at Saipan, MP, this 17th day of December, 1990.

Robert A. Hefner, Presiding Judge

END D

APPENDIX E

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOTO ITO, as Personal Representative of the heirs of AKINOBU TIO, Deceased,	) CIVIL ACTION NO.
Plaintiff,	)
v.	) AMENDED SUMMARY JUDGMENT
MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI, and AMERICAN HOME INSURANCE CO.,	)
Defendant.	)

Upon the motion of the plaintiff to amend the summary judgment entered December 17, 1990 and for the reasons state in the Memorandum Decision entered this date;

The summary judgment is amended to read:

IT IS ADJUDGED the plaintiff take nothing by the complaint against Macro Energy, Inc., and Marianas Ocean Enterprises. Those defendants are entitled to court costs.

Dated at Saipan, MP, this 28 day of January, 1991.

Robert A. Hefner, Presiding Judge

END E

APPENDIX F

MOORE, CHING, BOERTZEL & LAWLOR,
A Professional Corporation
Suits 400, GCIC Building
414 West Soledad Avenue
Agana, Guam 96910
Telephone: (671) 477-9708

Of Counsel:
CARLSMITH BALL WICHMAN MURRAY
CASE MUKAI & ICHIKI
Carlsmith Building
Capitol Hill
Saipan, MP 96950
Telephone: (670) 322-3455/6

Attorneys for Defendants
Nobuo Hirai and Shigemi Yamagishi

IN THE SUPERIOR COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative of the heirs of AKINOBU ITO, Deceased,	)CIVIL CASE NO. 89-918
Plaintiff,	
vs.	) AFFIDAVIT OF THOMAS L. ROBERTS
MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI and AMERICAN HOME ASSURANCE Co.,	
Defendants.	
TERRITORY OF GUAM	)
City of Agana	) ss:

I, THOMAS L. ROBERTS, being first duly sworn, do hereby depose and state upon my oath:

1. That I am a Director and Shareholder in the law firm of Moore, Ching, Boertzel & Lawlor, P.C., the attorneys of record for Shigemi Yamagishi and Nobuo Hirai in the above-referenced action;

2. That at approximately 3:31 p.m. during the afternoon of June 21, 1991, this office received via facsimile a June 21, 1991 settlement offer made by Plaintiff, wherein the case was to be dismissed against Nobuo Hirai on the condition that "Mr. Hirai will meet with a (sic) expert of Plaintiff's choosing to discuss the events surrounding this case and his employment in Saipan" and on the condition that 'Mr. Hirai agrees to testify at the trial". A true and correct copy of the facsimile copy of this settlement offer and the facsimile transmittal page are attached hereto as Exhibits "A" and "B";

3. That at approximately 4:19 p.m. that same day, I caused Plaintiff's settlement offer to be sent via facsimile to Mr. Hirai, in care of Macro Energy, Inc. in Saipan, along with a cover letter. True and correct copies of our firm's facsimile confirmation slip and the confirmation copy of the cover letter are attached hereto as Exhibits "C" and "D";

4. That in the late afternoon of June 21, or June 22, 1991, Mr. Fitzgerald telephoned me to confirm that I had transmitted Plaintiff's settlement offer to Mr. Hirai;

5. That on June 25, 1991 at the Macro Energy dive shop in Saipan, I met with Shigemi Yamagishi and Nobuo Hirai, both together and separately, for several hours, discussing Mr. Fitzgerald's settlement offer. A true and correct copy of Mr. Fitzgerald's offer, bearing Mr. Hirai's signature and evidencing his receipt of the same, is attached hereto as Exhibit "E";

6. That at the conclusion of our meetings at approximately 2:30 p.m. on June 25, 1991, at Macro Energy's dive shop, a Macro Energy employee typed an unconditional written acceptance of Mr. Fitzgerald's offer with signature spaces for both Mr. Hirai and myself, which we executed at that time. A true and correct copy of this executed acceptance is attached hereto as Exhibit "F";

7. That after Mr. Hirai and I executed the acceptance, I told Mr. Hirai to take three hours to think about our discussions by himself, and that if he still wanted to accept the settlement offer, he should telephone me at the Hyatt Regency Saipan just prior to 5:30 p.m. that evening, whereupon I would fax our written acceptance to Mr. Fitzgerald's office;

8. That sometime between 5:00 and 5:15 p.m. on June 25, 1991, a Macro Energy employee telephoned me at the Hyatt Regency Saipan to inform me that Mr. Hirai wanted to accept the settlement offer, and that I should go ahead and fax our acceptance, at which time Mr. Hirai came on the line and reconfirmed his desire to accept the settlement offer;

9. That commencing at exactly 5:30 p.m. on June 25, 1991, I caused Hyatt Regency Saipan employees to send via facsimile to Mr. Fitzgerald's office both Mr. Hirai's written acceptance of Plaintiff's settlement offer and a copy of the offer itself bearing Mr. Hirai's signature. True and correct copies of the facsimile confirmation pages for both the acceptance as well as the offer bearing Mr. Hirai's signature are attached hereto as Exhibits "G" and "H";

10. That the next day, shortly after heated arguments in the morning in Saipan's Superior Court on Mr. Fitzgerald's renoticed motion for summary judgment on the "air' issue, but prior to the afternoon arguments on the "Judicial admission" issue, just outside the door of Courtroom A and within earshot of Mr. Hirai, and within the presence of Mr. Horiguchi, Mr. Fitzgerald told me the settlement was off;

11. That at that time I informed Mr. Fitzgerald that as far as I was concerned, we had a binding agreement and I did not accept his repudiation, whereupon Mr. Fitzgerald told me that the deal was "contingent' or 'conditioned" on Mr. Hirai testifying consistently with his deposition testimony, which was an apparent reference to an Affidavit executed by Mr. Hirai and filed on his behalf at 10:07 a.m. earlier that day;

12. That at no time during that conversation did Mr. Fitzgerald refer to any written materials or oral communications other than Mr. Hirai's deposition testimony;

13. That one day later, I received a June 27, 1991 facsimile transmission from Mr. Fitzgerald formally withdrawing the settlement

offer, which had been unconditionally accepted two days earlier, a true and correct copy of which is attached hereto as Exhibit "I";

14. That I have personal knowledge of the matters attested to herein, and if called, could testify competently thereto; and Further your Affiant sayeth naught.

THOMAS L. ROBERTS

SUBSCRIBED AND SWORN to before me this 11th day of September, 1991.

Notary Public

LAW OFFICES
WILLIAM M. FITZGERALD

June 21, 1991

John E. Moore, Esq.
Moore, Ching, Boertzel & Lswlor
Suite 400, GCIC Building
414 West Sledad Avenue
Agana, Guam 96910

Re: Ito v. MOE, et al.

Dear Mr. Moore:

This will constitute Plaintiff's offer to defendant Nobuo Hirai to dismiss the case with prejudice against him under the following conditions:

a) Mr. Hirai will meet with a expert of Plaintiff's choosing to discuss the events surrounding this case and his employment in Saipan.

b) Mr. Hirai agrees to testify at the trial.

There is a treaty between the United States and Japan which allows execution in Japan and if a judgment is obtained against Mr. Hirai we intend to pursue all avenues open to us to execute on any of his assests. This offer therefore provides a very significant benefit to your client and I hope that you will communicate it to him as expeditiously as possible.

Sincerely yours,

WILLIAM M. FITGERALD

June 25, 1991

William M. Fitzgerald, Esq.
P.O. Box 909
1st Flr., Macaranas Bldg.,
Garapan, Saipan MP 96950

Re: Ito vs. Macro Energy, Inc.
Civil Action 918-89

Dear Mr. Fitzgerald:

My client, NOBUO HIRAI, unconditionally accepts the offer to settle the case against him contained in your letter of June 21, 1991 under the terms specified therein.

THOMAS L. ROBERTS

NOBUO HIRAI

LAW OFFICES
WILLIAM M. FITZGERALD

June 27, 1991

Thomas L. Roberts, Esq.
Moore, Ching, Boertzel & Lawlor
Suite 400, GCIC Building
414 West Soledad Avenue
Agana, Guam 96910

Re: Ito v. MOE, et al.

Dear Mr. Roberts:

The offer to setle with Nobuo Hirai was made in the good faith belief that while e might not agree with everything that he had to say, he would testify consistently with previous testimony and admissions. The patently perjurious affidavit submitted at 10:07 a.m. yesterday makes a mockery of that and our offer is hereby withdrawn.

We sincerely would like to settle this matter with Mr. Hirai but feel that your continued representation of both these defendants prevents this since Mr. Hirai is being used to protect Yamagishi.

Sincerely,

WILLIAM M. FITGERALD

END F (including Exhibits)

APPENDIX G

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative of the heirs of AKINOBU ITO, Deceased,	)	CIVIL ACTION No. 89-918
Plaintiff,	)	
vs.	)	JUDGMENT
MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI, and AMERICAN HOME ASSURANCE	)	
Defendants.	)	

This matter came before the Court for trial on May 26, 1992 Based on the matters adduced at trial good cause appearing, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Plaintiff shall have judgment over and against defendants for general damages in the amount of $2,434,857.55.

2. Plaintiff is entitled to costs as may be taxed by the Clerk of Court.

SO ORDERED this 22nd day of June, 1992.

PEDRO M. ATALIG
Presiding Judge

END G

APPENDIX H

MAIR, MAIR, SPADE & THOMPSON
A Professional Corporation
Attorneys at Law Suite 807, GCIC Building
414 West Soledad Avenue
Agana, Guam 96910
Telephone: (671) 472-2089/2090

Attorneys for Defendant
American Home Assurance Co.

IN THE SUPERIOR COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative of the heirs of AKINOBU ITO, Deceased,	CIVIL ACTION No. 89-918
Plaintiff,	
vs.	AMENDED JUDGMENT
MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI, and AMERICAN HOME ASSURANCE	
Defendants.	

This matter came before the Court for trial on May 26, 1992. Based on the matters addressed at trial and good cause appearing, it is hereby ADJUDGED and DECREED that:

1. Plaintiff shall have judgment over and against defendants Yamagishi and Hirai for general damages in the amount of $2,434,857.55.

2. Plaintiff shall have judgment over and against defendant American Home Assurance Co. for general damages in the amount of $100,000 of the above stated sum, pursuant to the Commonwealth Direct

Action Statute and the terms and limits of the applicable policy of insurance.

3. Plaintiff is entitled to costs as may be taxed by the Clerk of Court.

SO ORDERED this 10the day of August, 1992.

PEDRO M. ATALIG

Presiding Judge

APPENDIX I

IN THE SUPERIOR COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative of the heirs of AKINOBU ITO, Deceased, Plaintiff, vs. MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI, and AMERICAN HOME ASSURANCE Defendants.	) CIVIL ACTION No. 89-918

REPORTERS TRANSCRIPT OF TRIAL
The Honorable Pedro Atalig, Judge
May 26, 1992-June 5, 1992
Tuesday, May 26, 1992
Vol I of XIV
Pages 1-108

Appearances:

For the Plaintiff:	William M. Fitzgerald, Esq.
For the Defendants: Nobuo Hirai, Shigemi Yamagishi	Law Offices of Moore, Ching & Boertzel by: H. Thomas Evans, Esq. Thomas L. Roberts, Esq.
American Home Assurance Co.	Law Offices of Mair, Mair & Spade by: Randall Todd Thompson. Esq

THE COURT: We're at trial.

MR. FITZGERALD: In the evening? I mean, to put him on the witness stand without any opportunity for me to...

THE COURT: Are the parties ready for trial, or not/

MR. FITZGERALD: We're ready, your Honor.

THE COURT; But I...taking a deposition of the witness during trial is...anything else?

MOTION FOR SUMMARY JUDGMENT

MR. FITZGERALD: Yes, your Honor, there is one further point. Well, just the...the question of the...there's another motion outstanding. The defendants have filed amotion to enforce a setlement, and this had never been set, and one of the points of the settlement was that the person who was offered the settlement, who agreed tothe settlement, was to cooperate to the plaintiff prior to the trial. So, I think the whole thing is pretty much moot at this point, and I would just request, or ask the court that this motion be denied or deemed untimely, orwhatever, so we don't have to be bothered with it.

THE COURT; I think there's another motion...a motionfor summary judgment?

MR. FITZGERALD: That's right.

THE COURT; And these were not heard, were they?

MR. FITZGERALD: Right, that's...I should have clar...I think we both should have clarified that in our pretrial statements. My position and understanding on that motion for summary judgment is that when we went in to that motion we were operating on the...with the understanding that the defendants had admitted that Mr. Ito. the decedent, had run out of air. And this also had something to do with the settlement offer. And then, I believe this was last June, the response came back that in fact Mr. Ito had not run out of air, that he had...and Mr. Hirai, the defendant, came up with a new affidavit. We filed a motion in front of Judge Hefner, requesting that the defendants be held to their judicial admission, and a hearing was had on that in which Judge Hefner stated that he felt that either Mr. Hirai

had misled his counsel, or his counsel had misled me, the plaintiff, but that he would allow them to basically withdraw their admission. So with withdrawal of the admission, basically, whether or not he ran out ofair became a factual issue, and I think that the summary judgment motion that we filed probably should be withdrawn at this point. And then...so, but the other issue is the settlement motion. I think it's kind of moot at this point and I just ask that it be denied.

MR. EVANS: I think Mr. Roberts would like to argue that motion, oif we can have just five minutes on that motion, because we thought the offer had been made and accepted. So, that would not make it moot.

THE COURT: But the motion was never heard.

MR. EVANS: That's right, you Honor. But, I mean, our position was that an offer of settlement had been made and that it was accepted, and I...

THE COURT: Yes, but before you could bring up before the court, you have to notice this thing, and set it for hearing.

MR. ROBERTS: If I can explain, your Honor. My name is Thomas Roaberts. I'm with the same firm as Mr. Evans. Mr. Evans will be trying the case. I'm along for logistical support. The motion was filed initially last September, for the reasons stated in my affidavit filed that date. In October the Superior Court certified certain decisions under Rule 54(b) and the whole case went up to the Supreme Court. It didn't return the Superior Court until January. In the intervening months, there was an agreement entered between counsel that the motion wouldn't be heard until Mr. Fitzgerald had a chance to take Mr. Hirai's deposition a second time, to ask him about the offending affidavit that purportedly caused Mr. Fitzgerald to repudiate his settlement offer. Through a series of scheduling difficulties, Mr. Hirai's deposition wasn't taken again until April 9the, only a month and a half ago. On April 7, Mr. Thompson and I appeared here on a defferent motion...two different motions in the same case, and basically, Judge Castro let us know he didn't want to hear any more motions. So, I'm just doing the best I can for Mr. Hirai, you Honor. I've raised it. If your Honor is willing to hear it today or at some point during the trial, we'd like to argue it. If your Honor would prefer that it be a matter of proof at some time during the trial, then that would be acceptable to us, too. But there is a reason for why it hasn't been heard

yet, and that was scheduling difficulties, and an agreement of counsel that the hearing would't go forward until Mr. Hirai's deposition could be retaken.

MR. FITZGERALD: I would take some issue with that. This point, again, goes back to last summer, and the settlement offer was revoked after Mr. Hirai filed his affidavit, changing what we had perceived as a judicial admission. Subsefquent to that,the motion to enforce the settlement was filed, and my position was, fine. I want to take Hirai's deposition. This was proabably in August or September. Counsel for the other side agreed. Mr. Hirai was off in Tokido, various times were discussed, and I believe agreed to, in early October, and Mr. Roberts is right that the case was certified, but actually, now as I recall it, it was up in...I think more importantly though, between October and February, when the Supreme Court dismissed the 54(b) certification...dismissed the appeal, the case came back down to this court. I believe it was the early part of February, the middle part of February. At that time I set a deposition, noticed a deposition for Mr. Hirai in Saporo, Japan. I got the permission signed and reserved the room in Saporo, went through all the cumbersome procedure to do his deposition in Japan. Mr. Evans suggested to me that it could be done cheaper if they brought Mr. Hirai to Guam. So I said, fine. So the deposition was set for March 1st...or the first week of March. Mr. Evans suggested that we do it in Guam. I said, fine, anytime in March we can do the deposition in Guam. I was then informed that Mr. Hirai would not be able to come to Guam until some time after April 8. So, I had set up the deposition for March first, it would have been done at that point, except for the request of the defendants and their representation that they would have him in Guam. After making that representation, they had to withdraw it because he had to work and couldn't come to Guam, so his deposition wasn't taken until April 8, or April 9, but it was taken then, and they still haven't filed the motion. Just because Judge Castro gave them a hard time about some other motions, that's no excuse for them not filing or resetting this motion. And like I said, the time is over. I mean, the part of the settlement was that he'd cooperate, and now once again we're ready to start trial, so the failure to have that issue resolved is clearly on the doorstep of the defendant.

THE COURT: We have about seven files this thick here, and these are matters that should have been taken up before trial. That's why I asked the parties, "are you ready for trial?" Now, at this point, to entertain this motion, the court will not...will deny the motion.

MR. FITZGERALD: Your Honor, I have agreed to admit all of the exhibits of the defendant. I submitted to them this morning, a marked copy of our exhibits and asked if we have an agreement on these exhibits. If not, which ones are...

THE COURT: Counsel?

MR. EVANS: I didn't hear the question, your Honor.

APPENDIX J

Consolidated Appeal Nos. 92-020 and 92-022

IN THE SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative
of the heirs of AKINOBU ITO, Deceased

Plaintiff,

v.

MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI AND AMERICAN HOME ASSURANCE CO.

Defendants.

ON APPEAL FROM THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

OPENING BRIEF
OF
DEFENDANT AND APPELLANT NOBUO HIRAI

VINCENTE T. SALAS, ESQ.
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Torres Building

Second Floor
San Jose, Saipan 96950
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Facsimile: (670) 234-7256

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Telephone: (415) 391-4200
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Attorneys for Defendant and Appellant
NOBUO HIRAI

his heirs should not have been able to recover in the court below. The Judgment should be reversed.

In Knight v. Jewett (1992) 3 Cal.4th 296; _____ Cal.Rptr.2d_____, the Court applied the doctrine of reasonable implied assumption of risk to recreational activity such as the one at bench. The Court stated:

> In the sports setting, however, conditions or conduct that might otherwise integral might be viewed as dangerous often are an part of the sport itself. Thus, although moguls on a ski run pose a risk of harm to skiers that might not exist were these configurations removed, the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them...in this respect, that nature of a sport is highly irrelevant in defining the duty of care owed by the particular defendant. (Knight at p. 315.)

Clearly, it is in the nature of scuba diving that there is an inherent risk associated with the possibility of drowning. Defendants have no legal duty to eliminate those risks inherent in the recreational activity.

F. The Trial Court Erred in Denying Hirai's Notion to Enforce Settlement

During the course of this litigation, Plaintiff and Defendant Hirai entered into a written settlement agreement.

On June 21, 1991, Plaintiff's counsel sent a written settlement offer to Hirai. The proposal was simple and short:

> This will constitute Plaintiff's offer to the defendant Nobuo Hirai to dismiss the case with prejudice against him under the following conditions:
>
> a) Hirai will meet with a [sic] expert of Plaintiff's choosing to discuss the events surrounding this case and his employment in Saipan.
>
> b) Hirai agrees to testify at the trial. (C.R. 9/12/91 11:46:13; 11:45:48; Excepts of Record, p. 54 et sec..)

Four days later,Hirai's counsel sent Plaintiff's counsel a written acceptance, signed by both counsel and the defendant, that was similarly simple and short:

> My client, NOBUO HIRAI, unconditionally accepts the offer to settle the case against him contained in your letter of June 21, 1991 under the terms specified therein. (C.R. 9/12/91 11:46:13; Excerpts of Record, p. 54, et sec..)

The following day, Plaintiff's counsel purported to orally revoke the offer, and a day later sent a letter purporting to withdraw it. (C.R. 9/12/91 11:46:13; Excerpts of Record, p. 67.)

Despite their executed settlement agreement, Plaintiff did not file a dismissal of Defendant Hirai. Accordingly, on September 12, 1992, Hirai filed a Motion for Summary Judgment on the basis of the settlement agreement. No opposition was ever filed. However, the parties stipulated to a stay of the hearing until the matter was finally heard on the first day of trial on May 26, 1992. At that time, the court stated that this matter should have been taken up before trial and rather than entertain the Motion, the Court denied the Motion. (Excerpt of Record, p. 53.)

The trial court committed error in two fundamental respects. First, procedurally, a Motion for Summary Judgment may be made at any time, including on the eve of, or even during trial. (Rule 56, Commonwealth Rules of Civil Procedure; Thrift v. Bell Lines, Inc. 296 F.Supp.214, 217 (D.C.S.C. 1967); H.J. Heinz Co. v. Beech-Nut Lifesavers, Inc. 181 F.Supp. 452, 459 (D.C.N.Y. 1960). Hirai's written settlement agreement entitled him to dismissal. Whether Plaintiff sought dismissal based upon that contract before or during trial has no bearing uponHirai's rights under the contract. He certainly did not waive his rights under the settlement contract by failing to enforce it before the trial. Obviously, if settlement agreement can only be enforced by Pretrial Motion, no settlements would ever be entered into during a trial. Accordingly, the basis for the court's, refusal to entertain Defendant's Motion is unsound.

Second, substantively, Defendant Hirai is entitled to enforcement of the settlement agreement. In Del Rosario v. Camacho, Civ. Action No. 88-868, a slip opinion entered on February 7, 1990, this court enforced John B. Camacho's oral agreement to settle a case after the plaintiff tried to repudiate the agreement, holding that "[o]nce a valid compromise and

settlement is reached, a court's primary object is to effectuate the intentions of the party," citing 15 A. ANJUR 2d, Compromise and Settlement, §§23. In the case at bench, the subject settlement agreement is not an oral agreement but a written settlement agreement.

According to the authors of 15 A. AMJUR 2d, §§25 (Bancroft Whitney 1976):

> A valid compromise in settlement is final, conclusive, and binding upon the parties and upon those who knowingly accept its benefit. It is as binding as any contract the parties could make, and as binding as if its terms were embodied in a judgment; and regardless of the actual merits of the antecedent claim may have been, they will not afterward be inquired into and examined.

A settlement is simply a contract. Once Plaintiff's offer was accepted, a contract was formed, and Plaintiff lacked power to revoke the original offer:

> [O]nly where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation. State v. Hallock, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 512, 474 N.E.2d 1178, 1180 (N.Y. 1984).

The written settlement agreement is, without doubt, a binding bilateral contract. Furthermore, Defendant Hirai performed under the contract. Specifically, he appeared and testified at trial, and made himself available to meet with Plaintiff's expert. CR 5/22/92 11:17:50.

Accordingly, Defendant Hirai was and is entitled to dismissal based upon the irrefutable written settlement agreement which is fully enforceable and was properly the basis for dismissal at the time of trial.

G. The Court Erred in Failing to Explain the basis For Its Conclusion That the Income Ito Could Have Been acted to Earn over His Working Life, Reduced To Its Present Value, Was $2,389,857.55.

§§913A of the Restatement of Torts, 2d, provides that "[t]he measure of a lump sum award for future pecuniary losses arising from a tort is the present worth of the full amount of the loss of what would have been received at the later time."
END J

APPENDIX K

IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative of the Heirs of AKINOBU ITO, Deceased,	)APPEAL NOS. 92-020 & 92-022) (Consolidated)) CIVIL ACTION NO. 89-918
Plaintiff/Appellee/ Cross-Appellant,	)
v.	) OPINION
MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI, AMERICAN HOME ASSURANCE COMPANY,	)
Defendants/Appellants/ Cross-Appellees.	)

Argued and submitted March 15, 1993

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BEFORE: DELA CRUZ, Chief Justice; VILLAGOMEZ, Associate Justice;
and CRUZ, Special Judge

DELA CRUZ, Chief Justice:

This consolidated appeal involves several issues arising from plaintiff's wrongful death suit as personal representative for the heirs of the decedent, Mr. Akinobu Ito. Ito drowned while on a scuba diving trip supervised by defendants. On the day of his death, Ito signed an "AGREEMENT FOR EXEMPTION FROM OBLIGATION."

The trial court ruled on a pre-trial motion that the release exonerated defendant Macro Energy, Inc. ("Macro") and Marianas Ocean Enterprises ("MOE"), but not defendants Yamagishi and Hirai. After a two-week trial, the trial court found that Yamagishi and Hirai's negligence was a proximate cause of Ito's death, and entered judgment for plaintiff. The threshold issue on this appeal is whether the release exonerates any of the defendants for their negligence. Plaintiff and defendants also raise several other issues on appeal, including one involving the coverage liability of defendant American Home Assurance Company.

We hold that the release does not exonerate any defendant because, as drafted, it does not comply with Restatement (Second) of Torts Section 496B, the applicable rule in the Commonwealth governing express assumption of risk. We therefore go on to address the other issues raised by the parties.

I. PROCEDURAL HISTORY.

This lawsuit was filed by Ryoko Ito ("plaintiff") as personal representative of the heirs of her deceased husband, Akinobu Ito ("Ito")./1/ Ito drowned on September 24, 1988, during a scuba diving accident at Saipan's "Grotto."

The other parties in this lawsuit are as follows:

Macro Energy, Inc. ("Macro"), the Saipan-based scuba diving company that trained Ito to dive in June of 1988 and to which he returned on September 24, 1988.

Marianas Ocean Enterprises ("MOE") -- alleged to be the "alter ego" of Macro.

/1/

The CNMI's wrongful death statute is found at 7 CMC Section 2101. Subsection (a) provides, in part:

When the death of a person is caused by [a] wrongful act, neglect or default such as would have entitled the party injured to maintain an action and recover damages in respect thereof if death had not ensued, the person or corporation which would have been liable if death had not ensued, . . . is liable to an action for damages notwithstanding the death of the person injured . . . .

Shigemi Yamagishi ("Yamagishi") -- diving instructor and Macro's president.

Nobuo Hirai ("Hirai") -- assistant instructor employed by Macro.

American Home Assurance Company ("American Home") Macro and Yamagishi's insurer during all relevant dates./2/

Plaintiff's complaint contained four causes of action relating to (1) negligent instruction by defendants in the June 1988 scuba diving course; (2) negligence of defendants on the day of Ito's death, September 24, 1988; (3) coverage under the American Home insurance policy/3/ and (4) MOE's alter-ego relationship with Macro.

On November 7, 1990, Macro, American Home, Yamagishi, and Hirai moved for summary judgment under Section 496B of the Restatement of Torts (Second), based on the "AGREEMENT FOR EXEMPTION FROM OBLIGATION" (herein referred to as the "release agreement" or the "release") which Ito signed on the morning of his accident. The trial court granted the motion as to all four movants on December 17, 1990. On December 27, 1990, plaintiff moved for reconsideration of the order granting summary judgment.

On January 21, 1991, the trial court heard oral argument on plaintiff's motion for reconsideration, and, on January 28, 1991, entered an "Amended Summary Judgment" and "Memorandum Decision" which held that Yamagishi and Hirai were not released from

/2/ American Home Assurance Company was named as "American Home Insurance Company" in plaintiff's complaint. American Home Assurance Company appeared and litigated this action despite the defect. Accordingly. we have corrected its name in this caption.

/3/ Plaintiff brings this suit against American Home pursuant to the Commonwealth's "direct action" statute. 4 CMC §7502(e).

liability./4/ The trial court also ruled that, although MOE was not a movant, "[s]ince the complaint included MOE as a defendant based upon the theory that it was the alter ego of Macro, the grant of summary judgment does run in favor of MOE." Memorandum Decision of January 28, 1991 at 4. Therefore, after January 28, 1990, plaintiff's case stood only against defendants American Home, Yamagishi and Hirai.

On April 16, 1991, after a hearing on a motion for summary judgment brought by American Home, the trial court ruled that American Home's liability coverage was limited to $100,000. it also ruled that plaintiff had waived her claim for loss of consortium. See Memorandum opinion dated April 16, 1991.

Thereafter, in September 1991, American Home, Yamagishi and Hirai moved, pursuant to Rule 54(b), Commonwealth Rules Civil Procedure, for certification of (1) the trial court's January 28, 1991 judgment regarding the release and (2) the trial court's April 16, 1991 order regarding the policy limits and plaintiff's claim for loss of consortium. We dismissed these appeals because they were not final within the meaning of Rule 54(b). See Ito v. Macro Energy, Inc., Nos. 91-032, 91-033, 91-034 & 91-037 (Consolidated) (N.M.I. Feb. 3, 1992).

A two-week trial was held between May 26, 1992 and June 5, 1992, after which the trial court entered judgment in the amount of $2,434,857.55 against Hirai, Yamagishi and American Home. On August 10, 1992, after motion by American Home, the court issued an

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/4/ The trial court's Amended Summary Judgment does not state why the trial court changed course. The court wrote: "upon further review of the Exemption Agreement, the court finds that its coverage does not extend to defendants Hirai and Yamagishi individually." Memorandum Decision of January 28, 1991 at 4. Defendants Yamagishi and Hirai contend on appeal that the trial court amended its order because they were not specifically mentioned in the release.

Amended Judgment limiting American Home's liability for damages to $100,000.

Yamagishi and Hirai timely filed a joint notice of appeal on August 14, 1992. Plaintiff also timely appealed on August 21, 1992. We consolidated the two appeals on September 22, 1992. Other procedural matters of this case are set forth where pertinent, below.

II. FACTS.

The following 73 points of fact are taken verbatim from the trial court's Findings of Fact and Conclusions of Law dated June 22, 1992 (hereafter, "Findings of Fact")./5/

1. In June of 1988, the decedent, Akinobu Ito ("Ito") with Yosuhiro Fujitomi ("Fujitomi") enrolled in a scuba diving course offered by MACRO Energy, Inc. ["Macro"] in Saipan.

2. Shige Yamagishi ("Yamagishi") is a shareholder and a director of [Macro].

3. Yamagishi is the diving instructor of [Macro].

4. Ito enrolled in the scuba diving course so that he [could] obtain[] certification as an open water diver.

5. The course [Macro] offered Ito, require[d] minimal pre-dive instruction and training. There was no pool or confined water training. Written student testing consisted of requests for student/volunteers to answer questions orally whether the students answered the questions correctly or not the instructor revealed the answer to the students who filled in the answers on their book.

/5/ Defendants do not directly challenge the trial court's factual findings except to argue that (1) the trial court applied a wrong standard of care in evaluating their dive course and supervision, and (2) the trial court's damage award was excessive and clearly erroneous. These issues are discussed below.

Water instructions took place inside the Grotto./6/

6. Upon the completion of Ito's scuba diving course, Yamagishi signed a certification card certifying Ito as an ADS open water diver. ADS is a Japanese scuba diving agency that issues a card certifying a diver as an open water diver.

7. Yamagishi signed a certification card certifying Ito as a CMAS one-star diver. CMAS is a French agency which is internationally recognized around the world and issues a card certifying a diver as a CMAS one-star diver.

8. Although Yamagishi signed the ADS and CMAS certification for Ito, he never personally instructed Ito in the class or in the water instruction in the Grotto.

9. Open water diver is a term recognized as being required in any certification course issued by various agencies.
Various agencies around the world certify people as scuba divers under standards established for their respective agencies.

10. The course that Ito and Fujitomi attended to receive their open water diver certification did not meet the minimum standards.

11. CMAS has specific standards which describe the knowledge and skills required in order for a diver to be granted a CMAS one-star diver certificate.

/6/ The Grotto is a sometimes turbulent pool of water surrounded on three sides by a natural rock formation. It contains three underwater outlets through which a diver can swim into the Pacific ocean. These outlets differ in length and width. The north entrance requires a diver to go 15 feet underwater and swim under an overhead rock formation for another 10 to 15 feet. This outlet is very simple to dive. It was revealed at trial that on a calm day, a strong swimmer can "free dive" under the rock formation and out to the ocean quickly without the assistance of an underwater breathing apparatus. This was not the hole used by the divers in this case. The hole that was used was the center hole. This hole is approximately 20 meters [65.6 feet] underwater and is approximately 120 feet in length.

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12. CMAS has a diver training program which indicates the current standard of training necessary in order to reach the minimum level of proficiency required for the award of a CMAS one-star diver certificate.

13. The course that Ito attended to receive his open water certification did not meet the standards or follow the training program required by CMAS.

14. Yamagishi did not exercise reasonable care as a scuba instructor in certifying Ito as an open water diver and a CMAS one star diver.

15. The following is a partial list of the deficiencies of the course that Ito took before Yamagishi issued the two certification cards:

(a) Unqualified persons were employed as instructors.

(b) Students were not given text books.

(c) Ito was not given time to study for a theory test.

(d) Ito was not given a formal test that would require him to prove mastery of scuba diving theory.

(e) No accurate records exist of by whom or what Ito was taught.

(f) No accurate records exist to prove that Ito demonstrated his mastery of the required scuba diving skills to a qualified instructor.

(g) No record exists to prove that Ito was taught scuba diving theory by a qualified instructor.

(h) Ito was taught a major part of the course by Aline Bouhey who was not a qualified instructor at the time.

(i) The only records that do exist were fabricated by Shige Yamagishi after Akinobu Ito was dead.

(j) The confined water training was done at the Grotto which is not an appropriate place to learn the necessary skills.

(k) open water dive training was virtually non-existent and provided no opportunity to practice skills during supervised ocean dives.

(l) Octopus breathing was not taught.

(m) The number of exposures to each skill was not enough to learn the skill.

(n) Ito was not taught rescue techniques.

16. Yamagishi deceived Ito into believing that he was receiving the legitimate CMAS one star course and a legitimate open water diver course.

17. Ito was not aware of all the risks of scuba diving as a legitimate CMAS one star diver and an open water diver would be because he had not been properly trained.

18. Failure to receive the proper training in the scuba diving course that Ito took in June, 1988 was a proximate cause of Ito's death in September 24, 1988.

19. In September, Ito returned to Saipan to go scuba diving.

20. On September 24, 1988, Ito paid for the services of a dive guide because he did not want to dive unsupervised.

21. Shige Yamagishi and Nobuo Hirai were aware that Akinobu Ito was a CMAS one star diver, and that he had had only one ocean dive outside of the inner pool of the Grotto.

22. Yamagishi and Hirai knew that the dive that they planned to take Ito, along with fourteen other people, on[] that day was a deep dive and that Ito had never dove deeper than 30 feet.

23. Yamagishi and Hirai knew that divers must be closely supervised on their first deep dive.

24. A dive of more than 100 feet is a deep dive.

25. Yamagishi and Hirai undertook to render the service of dive guide and dive supervisor of Akinobu Ito.

26. Yamagishi and Hirai failed to exercise reasonable care in the performance of supervising the dive.

27. Yamagishi was a shareholder and officer of the company that provided the scuba diving equipment and was responsible for its proper maintenance.

28. The regulator given to Ito leaked air which may have caused air to be used faster than normal.

29. The pressure gauge of the regulator given to Ito read 130 psi higher than was actually in the tank, so if the gauge read 400 psi, it actually only had 270 psi in the tank.

30. Yamagishi and Hirai failed prior to the dive to familiarize themselves with the divers under their charge and their respective abilities.

31. Yamagishi and Hirai failed to discuss with Ito the special circumstances of a dive to more than 100 feet, including the more rapid exhaustion of air and nitrogen narcosis.

32. At the site of the Grotto, Yamagishi and Hirai failed to give an adequate dive briefing and failed to check Ito's equipment.

33. During the first half of the dive, Yamagishi was the only guide with fourteen divers.

34. Yamagishi led the dive to a depth of more than 100 feet far beyond the training capabilities of Ito.

35. Scuba divers are required to dive with a partner termed a buddy; Fujitomi and Ito were buddies.

36. Fujitomi developed a problem with his air source and was assisted by Hirai and the two rose to the surface.

37. At the time that Fujitomi rose to the surface, Ito followed the correct procedure that he had been taught and followed his buddy Fujitomi to the surface.

38. At the time Ito, Fujitomi and Hirai rose to the surface, Yamagishi was at the mouth of the central entrance to the Grotto, with all the other divers between them.

39. At the time that Fujitomi rose to the -surface Hirai failed to signal Yamagishi to halt the dive and Yamagishi failed to wait to resolve the problem.

40. With two divers on what he claims is the dangerous surface, Yamagishi, without determining their problem, turned and led the other divers back through the Grotto entrance and at no time after that did Yamagishi ever search for them.

41. At the time that Ito rose to the surface Hirai did not instruct him to immediately descend and join the other divers.

42. At the time that Ito rose to the surface Hirai did not check Ito's remaining air supply.

43. Hirai directed Ito to follow him down and then chose the longest and deepest way to return to the surface inside the Grotto.

44. A much easier and safe alternative was available to Hirai by snorkeling on the surface with inflated BCD and then returning through the much more shallow and shorter northern entrance.

45. At the entrance to the tunnel to return to the inner Grotto, Hirai had 1500 psi of air, a very comfortable supply even for two people.

46. At the same point Ito had only between 400-500 psi, a questionable amount, particularly because at readings of less than 500 the pressure gauges are not as accurate as they are at higher readings.

47. Instead of swimming normally holding on to Fujitomi and Ito, Hirai turned upside down and pulled himself along the roof of the center tunnel of the Grotto, with Fujitomi clutching his tank and he using his hands to pull himself along the roof.

48. Hirai's goal seemed to be to arrive at the surface in the fastest time rather than in the safest way, yet there was no reason for his haste, since he had ample air.

49. Hirai's decision to pull himself along the roof prevented him from maintaining a clear view of Ito and keeping Ito close by holding onto Ito's vest.

50. At some point in the tunnel, Ito gave Hirai an out of air sign and Hirai gave him his octopus regulator.

51. Hirai did not hold Ito's vest while Ito was using his regulator in violation of the standard procedure that he had learned in his training.

52. Hirai continued his unreasonable crawl along the roof upside down, instead of swimming normally to the surface while holding onto Ito and Fujitomi.

53. After discovering that Ito was not together with him when he surfaced, Hirai dove and brought Ito to the surface.

54. The most important thing to do for a submersion incident victim is to get the victim out of the water as quickly as possible.

55. Hirai and Yamagishi did not take Ito directly out of the water but attempted for fifteen to twenty minutes to resuscitate him in the water.

56. At this time one of the members of the dive group, a Dr. Takagi, surfaced and observed that Hirai and Yamagishi were supporting Ito on the surface and giving mouth to mouth resuscitation to him; he noted the time as 10:46.

57. Takagi watched for three or four minutes and then went over to help, Yamagishi told him to take Ito's pulse, and he did noting that the pulse was 60 and beating normally. Yamagishi told Takagi to make sure in taking the pulse. Ito vomited water a number of times.

58. Thereafter at two to three minute intervals Takagi continued to take Ito's pulse and it continued to beat at rate of about 40/50 per minute.

59. Shortly after 11:00 the pulse rate became drastically weak and pinkish water started coming out of Ito's mouth.

60. At 11:03 the pulse became 0, and Yamagishi said to get him up, and other people then helped to get him up and out of the water, where heart massage was commenced and mouth to mouth resuscitation continued.

61. At about 11:10 the ambulance arrived and they carried Ito away and he was pronounced dead on arrival at the Commonwealth Health Center.

62. The appropriate treatment for either drowning or air embolism is oxygen. Yamagishi and Hirai did not have oxygen at the Grotto.

63. Akinobu Ito's cause of death was drowning.

64. Yamagishi and Hirai made statements to the police and other agencies immediately after the incident but did not mention seeing blood in the water.

65. Blood is a potential symptom of air embolism but is seldom seen.

66. Air embolisms occur because of a change in pressure upon ascent, and descent.

67. Pink froth is indicative of pulmonary edema which results from the inhalation of water or other foreign matter to the lung.

68. The blood found in Ito's stomach resulted from his stomach ulcer.

69. Hirai stated in a memorandum to the Japanese Consulate that at 11:05 Ito had a weak pulse.

70. At the time of his death Akinobu Ito was 46 years old, gainfully employed by a major Japanese company, earning more than $60, 000 a year. He expected to work for that same company or one of its subsidiaries until he was seventy years old.

71. Akinobu Ito is survived by a loving wife Ryoko and two children, Chiyo and Masteru.

72. The income that Akinobu Ito could have been expected to provide to his wife and children over his working life reduced to present value at an exchange rate of Y126.78/$ is $2,389,857.55.

73. Funeral and burial expenses total $45,000.

III. ISSUES PRESENTED AND STANDARDS OF REVIEW.

1. The threshold issue on this appeal is whether Ito expressly assumed the risk of harm arising from defendants' negligence by sighing the release, and, if so, which defendants are exonerated by operation of the release. The trial court interpreted the release as exonerating defendants Macro Energy and MOE and entered summary judgment in their favor. We review de novo the effect of the release on the question of liability. Rios
v. MPLC, No. 92-019 (N.M.I. Feb. 19, 1993)./7/

2. Whether Ito impliedly assumed the risks which led to the accident.

3. Whether Ito was contributorily negligent.

4. Whether the trial court applied an incorrect standard with respect to defendants, duty of care.

Issues no. 2 through 4 involve mixed questions of law and fact and therefore are reviewed de novo. Id.

5. Whether the trial court erred in failing to consider defendant Hirai's motion for summary judgment to enforce a settlement agreement on the date set for trial. A trial court's failure to rule on a motion is a denial thereof by operation of law and, in this case, implicates the trial court's power to control its docket. We therefore review its ruling for abuse of discretion. Atchinson, Topeka & Santa Fe Ry. Co. v. Parr, 391 P.2d 575 (Ariz. 1964); Edwards v. Cass County, Tex., 919 F.2d 273 (5th Cir. 1990).

6. Whether the trial court erred in ruling that plaintiff had waived her loss of consortium claim. The trial court found that plaintiff's counsel "admitted" that plaintiff had no claim for consortium on summary judgment. Such ruling is a conclusion of law

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/7/ In the trial court, plaintiff and MOE briefed the issue of whether MOE is the "alter-ego" of Macro. However, "the issue was not resolved in the trial court. [Footnote omitted.] Instead, summary judgment proceedings commenced on the issue of the express release agreement." See Brief of appellee MOE at x. We do not decide the alter-ego issue because it has not been raised on this appeal.

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and is reviewable de novo. Rios v. MPLC, No. 92-019 (N.M.I. Feb. 19, 1993).

7. Whether the trial court erred in its calculation of damages, and in not revealing its calculations in determining damages. Damage awards are reviewed under a "clearly erroneous standard." Reyes v. Ebetuer, No. 90-017 (N.M.I. Jan. 29, 1992).

8. Whether the trial court erred in ruling that American Home's coverage under the policy is limited to $100,000. The trial court's interpretation of language in an insurance policy involves a question of law which is subject to de novo review. Tokio Marine & Fire Ins. Co., Ltd. v. Marianas Ocean Enterprises, Inc., 3 CR 748, 753 (D.C.N.M.I. App. Div. 1989).

IV. ANALYSIS.

1. Ito's Express Assumption of the Risk.

The release which Ito signed before the diving accident and which is critical to this litigation states as follows:

MACRO ENERGY, INC.

APPLICATION FOR PARTICIPATING IN SCUBA DIVING & INVOICE

* * *

(AGREEMENT FOR EXEMPTION FROM OBLIGATION)

I SUBMITTED AN APPLICATION FOR PARTICIPATING IN THE DIVING TOUR AND OR TRAINING PROGRAM TO BE CONDUCTED BY YOUR AGENCY. I FULLY ACCEPT AND UNDERSTAND THAT SUCH A DIVING TOUR AND TRAINING INVOLVES BASIC RISK AND DANGER.IF WE FAIL TO ABIDE BY THE RULES AND REGULATION SET BY THE GUIDES AND INSTRUCTORS AND IF WE NEGLECT THE DIVING RULES, WE REALIZE THAT WE MAY RISK OUR LIVES. ALL THE RISKS THAT WE MAY HAVE DURING THE PERIOD OF STAY HERE BELONG TO EACH OF US PERSONALLY. IN CASE OF ACCIDENT, CAUSING INJURY OR DEATH TO MYSELF, I MYSELF, MY FAMILY, OR INHERITED ORGANIZATION AND OTHER RELATED PERSONNEL SHALL HAVE NO RIGHT TO PROTEST AGAINST NOR TO CLAIM FOR DAMAGES. WE HEREBY SWEAR TO ABIDE BY AND ACT AT THE RULES AND INSTRUCTIONS SET BY THE GUIDES AND INSTRUCTORS. ALSO I AM FULLY A GROWN UP AT LAW AND I ACKNOWLEDGE THE FACT THAT I AM FULLY QUALIFIED TO SIGN THIS AGREEMENT, TO VERIFY THE EXEMPTIONS FROM ALL THE CLAIMS FOR DAMAGES. ALL THE ITEMS IN THIS APPLICATION ARE TO BE DECIDED

BY THE AGREEMENT, AND I PERSONALLY SIGN THIS DOCUMENT AT MY OWN WILL RATHER THAN SOMEONE DIRECTING ME TO SIGN THIS PAPER.

The release also contains the above paragraph in Japanese./8/ The release was signed by Ito and dated "9/24/88." The trial court initially ruled that the release exonerated all defendants, but subsequently amended its summary judgment and ruled that the release did not exonerate defendants Yamagishi, the president of Macro Energy, and Hirai, an employee of Macro Energy.

In the Commonwealth, the rules of the common law as expressed in the Restatements of the law as approved by the American Law Institute serve as the applicable rules of decision, in the absence of written or local customary law to the contrary. 7 CMC §3401. Because we have no statute or local customary law regarding express releases, Restatement (Second) of Torts Section 496B (hereafter referred to as "Section 496B") is applicable. That section provides:

> A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy.

There is no dispute that the release is either a "contract" or a document by which Ito may have "otherwise expressly agree [d]" to assume certain risks. There also is no dispute that Ito read and executed the release. The issue on appeal concerns the language of

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/8/ The decedent rentty was proficient only in Japanese, and read the inse language version of the release before signing it. At oral argument, counsel for plaintiff stated that only the English language version of the release has been the subject of dispute in this lawsuit. Defendants do not contend otherwise, nor do they assert that the Japanese version of the release contains language which in legal effect differs from the English version. Therefore, our decision is based solely on the English language version.

the release instrument, and whether that language, as a matter of law, exonerates defendants from their negligence. We conclude that it does not.

A. The Requirements of Section 496B.

In order for a release to be valid and binding, it must comply with the requirements of Section 496B. In determining whether the release meets the requirements of Section 496B, we shall strictly construe the language of the release, Schutkowski v. Carey, 725 P.2d 1057, 1060 (Wyo. 1986), especially where, as in this case, it is drafted by defendants and purports to exonerate them. Valley Ranch, Inc. v. Simkin, 784 P.2d 781, 784 (Colo. 1989); see also, Section 496B cmt. d.

By signing the release, Ito must have "expressly agree[d] to accept a risk of harm arising from the defendant[s'] negligent or reckless conduct." (Emphasis supplied.) We turn to the language of the release to determine what risks Ito "expressly" agreed to assume.

In doing so, we find no mention of Ito accepting a risk of harm arising from the "defendant[s'] negligent conduct." The release contains no language that the risk of harm which Ito agreed to assume was that harm which may arise due to defendants' negligence. Although the release states that "ALL THE RISKS THAT WE MAY HAVE DURING THE PERIOD OF STAY HERE BELONG TO EACH OF US PERSONALLY" and that Ito (or his heirs) will not file suit "IN CASE OF ACCIDENT, CAUSING INJURY OR DEATH TO MYSELF," it fails to mention that the risks encompass defendants' negligence.

The language of the release does not "expressly" warn or alert Ito that the risk of harm he was assuming is one that may arise from defendants, negligence. Absent clear language in the release itself, we are not persuaded, as a matter of law, that the release meets the requirements of Section 496B: that Ito "expressly agree[d] to accept a risk of harm arising from the defendant[s'] negligent or reckless conduct."

"[A]lthough uniformly agreeing that exculpatory agreements must be strictly construed against the drafter, [courts] are split on whether 'negligence' must be specifically mentioned [in a release], or whether more inclusive and general terms may be employed." Heil Valley Ranch, Inc., 784 P.2d at 784 (footnote omitted). This split in authority regarding such a requirement appears to be based on the various jurisdictions, public policy views pertaining to these types of releases, and how each views the importance of the language of the release itself, i.e. whether the language is sufficiently clear so that the one signing it knows what is being given up. In the absence of legislation, the common law is developed, based on the application of general notions of justice and fair play, taking into account the circumstances and experiences unique to a particular jurisdiction.

Our jurisdiction is not vested with a similar degree of freedom in formulating our own common law as that exercised by courts in other jurisdictions, because of the statutory dictate that we apply the Restatement. 7 CMC §3401. Thus, we must acknowledge the doctrine of express assumption of risk as set forth

in Section 496B, which is part of our "rules of decision" in the Commonwealth. Id.

In interpreting Section 496B, however, we shall side with those jurisdictions which take the more cautious approach with respect to express assumption of risk. In doing so, we interpret Section 496B as requiring that a release must expressly mention that the risks of harm being assumed by a releasor include those arising from a releasee's negligence or reckless conduct. Certain notable jurisdictions have taken this approach to releases. See Saenz v. Whitewater Voyages, Inc., 276 Cal.Rptr. 672 (Ct. App. 1990); Madison v. Superior Court, 250 Cal.Rptr. 299 (Ct. App. 1988); O'Connell v. Walt Disney World Co., 413 So. 2d 444 (Fla. App. 1982); Goyings v. Jack and Ruth Eckerd Foundation, 403 So.2d 1144 (Fla. App. 1981).

In Madison v. Superior Court, 250 Cal.Rptr. 299 (Ct. App. 1988), review denied, the court held that the release barred plaintiff's wrongful death action, which was premised on defendants, negligence during a scuba-diving course. The release at issue in Madison, however, clearly stated that the releasor agreed not to sue if he suffered injury caused "by

the negligence of" the releasees, and that the releasor agreed to "exempt and relieve [releasees] from liability for personal injury, property damage or wrongful death caused by negligence." Id. at 302 (quote in lower case). In upholding the release, the court wrote that "[a]s long as the release constitutes a clear and unequivocal waiver with specific reference to a defendant's negligence, it will be sufficient." Id. at 304 (emphasis supplied).

Florida agrees with the California analysis. In Goyings v. Jack and Ruth Eckerd Foundation, 403 So.2d 1144, for example, the court wrote, "an exculpatory clause, while not favored, may operate to absolve a defendant from liability arising out of his own negligent acts. For such a clause to be effective, however it must clearly state that it releases the party from liability for his own negligence." Id. at 1146.

Under the language of the release signed by Ito, we are not satisfied that, in signing the release, he "expressly agree[d]" to accept the risks, arising from defendants, negligence Or reckless conduct, which caused his death. The release fails to set forth any express language as to defendants, negligence.

B. Applying a Less-Restrictive Standard under §496B.

Some state jurisdictions have held that a release need not contain specific reference that the releasor is to assume the risk of harm arising from the releasee's negligent or reckless conduct. Heil Valley Ranch, Inc, 784 P.2d at 784; Blide v. Rainier Mountaineering, Inc., 636 P.2d 492, 493 (Wash. App. 1981), review denied, 96 Wash.2d 1027 (1982); Schutkowski, 725 P.2d at 1061. Where that is the case, however, the release must be "clear that the parties' intent was to release [defendants] from liability for negligence." Schutkowski, 725 P.2d at 1061.

If we were to disregard a strict interpretation of the requirements of Section 496B and apply Schutkowski's less-restrictive standard to the release signed by Ito, the release would still not meet that standard because the only risk of harm which the release covers are those arising from Ito's conduct, not the risk of harm arising from defendants, negligence. The release alerted Ito that he could be injured if he failed "TO ABIDE BY THE RULES AND REGULATION SET BY THE GUIDES AND INSTRUCTORS," or if he were to "NEGLECT THE DIVING RULES."/9/

We fail to see how these warnings regarding injury arising from Ito's failure to follow diving rules and regulations could be satisfactorily construed to mean that he intended "to release [defendants] from liability for [their] negligence." Schutkowski, 725 P.2d at 1061. The release as drafted and signed by Ito simply was not "clear" regarding the parties' intent. Thus, even if we read the release broadly, we still have difficulty construing the language of the release as containing an intent to absolve the releasees from their negligence.

C. The Effect of Comment d.

Yamagishi and Hirai contend that Comment d to Section 496B supports a ruling that the release exonerates them from liability. However, we are not convinced that if we apply the test implicit in Comment d, we would reach a different result.

Comment d provides that a "general clause[] . . . will not be construed to include loss or damage resulting from [a defendant's] intentional, negligent, or reckless misconduct unless the circumstances clearly indicate that such was the plaintiff's

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/9/ The trial court found that it was defendants who did not abide by the rules of proper training, supervision and rescue. See, Findings of Fact Nos. 13-18.

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understanding and intention." (Emphasis supplied.) Thus, where a general clause is used in the release, as in this case, the rule is that courts may not construe it to release a defendant from liability unless "the circumstances clearly indicate that such was the plaintiff's understanding and intention."

Here, again, the general clause releases the defendants from liability if Ito's death was caused by Ito's (1) failure to abide by the rules and regulations set by the guides and instructors, and (2) neglect of diving rules.

The general clause of the release reads:

> IN CASE OF ACCIDENT, CAUSING INJURY OR D, TO MYSELF, I MYSELF, MY FAMILY, OR INHERITED ORGANIZATION AND OTHER RELATED PERSONNEL SHALL HAVE NO RIGHT TO PROTEST AGAINST NOR TO CLAIM FOR DAMAGES.

This clause, when read together with the preceding sentences, does not "clearly indicate" that Ito understood or intended to release defendants from their negligence. For the reasons stated, even under Comment d, we do not read the releases "general clause" as exempting the negligent defendants from liability.

D. The Release Fails to Exonerate the Defendants.

The release at issue in this case does not meet the requirements of Restatement (Second) Torts Section 496B. We hold that a release, in order to be valid, at the very least must expressly mention that the releasor is assuming the risk of harm that may arise from the releasee's negligence or reckless conduct. Because the release which Ito signed did not comply with this requirement, we conclude as a matter of law that Ito did not "expressly agree[] to accept a risk of harm arising from the defendant[s'] negligent or reckless conduct." Section 496B. The trial court thus erred in ruling that the release exonerated defendants Macro Energy, Inc. (the named releasee) and its alleged alter-ego MOE. Both Macro and MOE, as well as their agents/employees Yamagishi and Hirai, are not exempted from liability by operation of the release.

Plaintiff asserted liability against Macro on the theory of respondeat superior. Ito's Supplemental Brief at 3. Macro is liable for the negligence of its employees and/or agents, Hirai and Yamagishi, unless they were "acting outside the scope of their employment" during the course of events that caused Ito's death. Restatement (Second) of Agency §219.

Plaintiff's complaint alleged that Hirai was employed by and Yamagishi was "an officer, director and/or employee" of Macro at the time the incident took place. Complaint ZZZZ 6 and 7. Macro, Hirai and Yamagishi filed a joint Answer and did not deny these allegations. Moreover, their joint Answer did not set forth an affirmative defense that Hirai and Yamagishi "acted outside the scope of their employment." And, Marcro's briefs on appeal do not assert such a defense, only the same defenses of Hirai and Yamagishi which were resolved against them by the

trial court and, as set forth below, by this court. Thus, we hold, as a matter of law, that Macro is subject to joint and several liability on the judgment.

We shall therefore remand the matter to the trial court for the limited purposes of (1) entering judgment against Macro, Yamagishi and Hirai, jointly and severally, in the amount of $2,434,857.55 and (2) determining whether MOE should also be held jointly and severally liable to plaintiff for the same monetary judgment, based on the theory that MOE is the "alter ego" of Macro.

2. Ito's Implied Assumption of Risk.

Defendants alternatively argue that if the release is not valid, Ito impliedly assumed the risk of harm arising from defendants, conduct. They contend that the risk of drowning is so inherent in the sport of scuba diving, that Ito must have impliedly assumed that risk by participating in the diving excursion with defendants.

The doctrine of implied assumption of risk, as contained in Restatement (Second) of Torts Section 496C (hereafter, "Section 496C"), states, in pertinent part:

> (1) Except as stated in Subsection (2), a plaintiff who fully understands a risk of harm to himself . . . caused by the defendant's conduct . . . and who nevertheless voluntarily chooses to enter or remain. . . .under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk.
> (2) The rule stated in Subsection (1) does not apply in any situation in which an express agreement to accept the risk would be invalid as contrary to public policy.

Plaintiff argues that Section 496C(1) is inapplicable because the release is "invalid as contrary to public policy" under Section 496C(2). In support, she points to the trial court's finding that "Yamagishi deceived Ito into believing that he was receiving the legitimate CMAS one star course and a legitimate open water diver course." Finding of Fact No. 16. We have already ruled that the release failed because it did not comply with the express requirements of Section 496B, not because accepting such risk would be contrary to public policy. We shall therefore address the issue of whether Ito impliedly assumed the risk of harm arising from defendants, conduct.

Under Section 496C (1), Ito's implied assumption of the risk must have been voluntarily made, with his full understanding of the risk of harm resulting from defendants' conduct. There is no dispute that Ito voluntarily chose to go diving. The issue, however, is whether Ito had knowledge of, and understood the risk of harm caused by defendants, conduct. Restatement (Second) of Torts Section 496D ("Section 496D") provides guidance in determining what level of knowledge a person must possess in order to impliedly assume the risk of harm arising from defendants, conduct. See, Restatement (Second) of Torts 5496C cmt. a. Section 496D states:

> Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character./10/

Defendants argue that Ito knew he could drown in water if he were to go scuba diving. See Section 496D cmt. d. That is true. However, the "risk of harm" which we must examine is that "arising from the defendant[s'] conduct." Section 496D. We need not examine any and all risks which could occur on a dive, such as drowning, a

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/10/ Again we note that, because the release used by defendants was invalid, Ito did not "expressly agree" to assume the risk of harm arising from the defendant's conduct.

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shark bite, or jellyfish sting.

Under Section 496D, Ito must have known of the existence of the risk and appreciated its unreasonable character to have impliedly assumed the risk. This means Ito "must not only be aware of the facts which create the danger, but must also appreciate the danger itself and the nature, character, and extent which make it unreasonable." Section 496D cmt. b. Whether Ito

was aware of and appreciated the dangers are questions of fact. See Section 496D cmt. e.

After a two week trial, the court found as a matter of fact that "Ito was not aware of all the risks of scuba diving . . . because he had not been properly trained." It also found that Ito's poor training "was a proximate cause of [his] death." (See Finding of Facts Nos. 17 and 18).

Although the trial court found that Ito "was not aware of all the risks of scuba diving," we cannot say with certainty whether he was likewise not aware of the specific risks which could arise from defendants, conduct. Nothing in the facts of this case indicates that Ito had any warning that defendants may be negligent in performing their duties.

There are no facts to indicate that Ito knew of the existence of the risk arising from defendants' conduct or that he "appreciate[d] its unreasonable character." Section 496D. Therefore, we hold that Ito did not impliedly assume the risk arising from defendants, conduct because he did not "fully" understand the "risk of harm to himself . . . caused by the defendant[s'] conduct" as required under Section 496C.

3. Ito's Contributory Negligence.

Defendants also argue that Ito was contributorily negligent as a matter of law because he failed to take reasonable precautions before encountering the risks of diving. According to Hirai, Ito failed to ask how long the dive would take and to find out what he should do if he and his dive buddy became separated. Defendants Macro and Yamagishi allege that Ito's death was caused by his violation of basic scuba diving rules and that Ito had the "last clear chance" to prevent his own death.

Contributory negligence is defined in Section 463 of the Restatement (Second) of Torts ("Section 463") as follows:

> Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm.

To conclude that Ito was contributorily negligent under Section 463, we conduct a two-step test. First, we must find that Ito did not observe the proper standard of conduct for his own safety. According to Restatement (Second) of Torts Section 464 (1), the standard of conduct "to which [Ito] must conform for his own protection is that of a reasonable man under like circumstances."

Only if we find that Ito's conduct did not meet this 'reasonable man' standard may we move on to the second part of the test which is whether Ito's conduct legally contributed to his death. In conducting this analysis, we may find that Ito's own negligence "is a legally contributing cause of his harm if, but only if, it is a substantial factor in bringing about his harm and there is no rule restricting his responsibility for it." Restatement (Second) of Torts §465(1).

We do not reach the second part of the test, however, because the facts show that Ito's conduct conformed to that of "a reasonable [person] under like circumstances." Section 464 (1). Ito took defendants' diving course. The trial court did not find from the evidence that Ito was negligent in the manner he conducted himself.

Defendants' assertion that Ito was negligent in failing to ask questions about the dive's depth, duration, course, and emergency procedures does not have merit. See Hirai's Opening Brief at 41. Defendants had the duty to provide this information to Ito and the other divers, not the other way around: "Yamagishi and Hirai failed to discuss with Ito the special circumstances of a dive to more than 100 feet, including the more rapid exhaustion of air and nitrogen narcosis." Also, "[a]t the site of the Grotto, Yamagishi and Hirai failed to give an adequate dive briefing and failed to check Ito's equipment." See Findings of Fact Nos. 31 and 32./11/

Defendants held themselves out to be professional dive instructors and supervisors. Ito reasonably relied on their representation of professionalism when he registered to learn how to dive from defendants, and subsequently when he decided to dive at the Grotto under defendants' professional supervision. Ito paid

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/11/ The trial court also found that "Yamagishi led the dive to a depth of more than 100 [feet] far beyond the training capabilities of Ito." Findings of fact No. 34.

for defendants' expert services. He had a right to expect that defendants would provide him with all important pre-dive information and conduct any last minute equipment checks that would be necessary. Defendants failed to do so.

It was the defendants who failed in their duty to Ito. Ito acted as a reasonable person would have under the circumstances. We, therefore, hold that Ito was not contributorily negligent under Section 463.

4. The Standard of Care for Diving.

Defendants argue that the trial court applied an incorrect standard of care in evaluating their conduct. They argue that the trial court erred because it measured their conduct "against a foreign standard of care rather than the prevailing standard of care in the Commonwealth." See Hirai's Opening Brief at 32; Yamagishi's Opening Brief at 34 (quote in lower case).

The trial court heard testimony by plaintiff and defendants, dive experts, and subsequently found that Marcro's diving course "did not meet the minimum standards" and "did not meet the standards or follow the training program required by CMAS." Findings of Fact Nos. 10 and 13. The trial court, therefore, applied a standard premised upon the CMAS requirements for dive certification. Defendants contend, however, that their conduct should be "adjudged according to the ADS/12/ standard adhered to by scuba diving shops throughout the community of Saipan." See

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/12/ ADS is a Japanese dive organization and is a member of CMAS, an internationally recognized French dive agency. Reporter's Transcript ("R.T.") Vol. III, pp. 225-226.

Yamagishi's Reply Brief at 20 (quote in lower case).

We reject defendants' contention for three reasons. First, defendants purported to certify Ito under the ADS and CMAS standards. The trial court found that defendant Yamagishi had "signed a certification card certifying Ito as an ADS open water diver" and "signed a certification card certifying Ito as a CMAS one-star diver."/13/ Findings of Fact Nos. 6 and 7.

Defendants may not now contend that, although they purported to certify Ito under the CMAS standard, the trial court should have adjudged Marcro's training course under a different "Saipan-only" standard. Defendants may not purport to offer one standard of dive instruction to its students, and subsequently argue that the trial court erred by not applying an apparently lower level standard in evaluating their dive course. The trial court correctly applied the standard which defendants themselves purported to offer Ito: CMAS.

Second, there apparently is no ADS "standard" for dive courses or other diving requirements. Defendants' own dive expert testified that he is "not familiar with any [ADS standard]" and that ADS "refer[s] to the CMAS standard."/14/ In light of this, we cannot say that the trial court erred in applying the CMAS standard.

/13/ In fact, "[t]he course that Ito attended to receive his open water certification did not meet the standards or follow the training program required by CMAS." Findings of Fact No. 13.

/14/ See R.T. Vol. XIII, pp. 1006-1007, quoted in Plaintiff's response Brief at 31-32. Yamagishi, on the other hand, states that the alleged ADS standard is "based in part on the CMAS standard" as "established and adhered to by the dive shops throughout Saipan." Yamagishi's Reply Brief at 22-23.

Lastly, we disagree with defendants' contention that there is, or should be, a unique standard for Saipan dive shops and professionals. Defendants argue that -- although there is no ADS standard -- there exists an "ADS standard adhered to by scuba diving shops throughout the community of Saipan." Yamagishi's Reply Brief at 20 (quote in lower case). Defendants, however, fail to state what sort of diving requirements and skills do or should comprise such a Saipan-only standard, even though their expert arguably "was and is intimately familiar with the standards of the scuba diving industry in the Commonwealth and throughout Micronesia." Hirai's Opening Brief at 39.

Defendants rely on Restatement (Second) of Torts Section 299A ("Section 299A"), which provides:

> Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

For some professions, an "[a]llowance must be made . . . for the type of community in which the actor carries on his practice." Section 299A cmt. g. For example, "[a] country doctor cannot be expected to have the equipment, facilities, experience, knowledge or opportunity to obtain it, afforded him by a large city." Id. However, this flexibility is not available to all professions. Comment g continues:

> In other professions, such as that of the attorney, such variations either do not exist or are not as significant, and allowance for them has seldom been made. A particular profession may be so uniform, in different localities, as to the skill and knowledge of its members, that the court will not feel required to instruct the jury that it must make such allowance.

The CMAS standard which the trial court applied is internationally recognized./15/ The trial court found that:

> CMAS has specific standards which describe the knowledge and skills required in order for a diver to be granted a CMAS one-star diver certificate.

> CMAS has a diver training program which indicates the current standard of training necessary in order to reach the minimum level of proficiency required for the award of a CMAS one-star diver certificate. (Findings of Fact Nos. 11 and 12.)

The trial court was not persuaded that an allowance should be made for local "variations" in the requisite skills of a scuba diving professional. Rather, it accepted the approach of plaintiff's dive expert who, in his evaluation of Marcro's dive course, "measured it against what is considered to be normal by the five major training agencies in the world."/16/

The trial court concluded that "Yamagishi did not exercise reasonable care as a scuba instructor in certifying Ito as an open water diver and a CMAS one star diver." Findings of Fact No. 14. This determination is supported by the evidence. See Martinez v. Asarco Inc., 918 F.2d 1467, 1471 (9th Cir. 1990) (what duty is owed plaintiff is question of law for the court, but whether defendant breached that duty is ordinarily reserved for the trier of fact).

/15/ "CMAS is a French agency which is internationally recognized around the world and issues a card certifying a diver as a CMAS one-star diver." Finding of Fact No. 7.

/16/ R.T. Vol. VIII, p. 625:6-8. Also, the trial court found that "[t]he course that Ito attended to receive his open water certification did not meet the standards or follow the training program required by CMAS." Finding of fact No. 13.

There is no reason why the court should apply a standard different from that which defendants offered Ito: CMAS. We hold that the trial court applied the correct standard of care in evaluating defendants' conduct./17/

5. The Plaintiff-Hirai Settlement Agreement.

On June 21, 1991, plaintiff offered to settle with defendant Hirai. Hirai claims he "unconditionally accepted" the offer on June 25, 1991. A day later, on June 26, plaintiff's counsel orally revoked the offer and, on June 27, sent a letter confirming withdrawal of the offer.

On September 12, 1991, Hirai filed a "Motion For Enforcement of Settlement Agreement". On May 22, 1992, the plaintiff filed a Pretrial Statement in which she noted that Hirai's motion to enforce the settlement agreement was filed but never set for hearing. On May 26, 1992, the first day of trial and just prior to counsels, opening statements, counsel for Hirai sought to argue the motion, but the trial court refused to hear it.

Defendant Hirai argues that the trial court abused its discretion in not hearing the motion for two reasons. First, Hirai argues, as a defendant he could bring his motion, which he contends was for summary judgment, "at any time." Com.R.Civ.P. 56(b). Hirai interprets this to mean "including on the eve of, or even during trial." Hirai's Opening Brief at 44. As Hirai notes, some

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/17/ We do not imply that any diving standard which defendants may have offered would be acceptable. CMAS, which is one of the world's major dive training agencies, qualifies as an acceptable standard in the Commonwealth.

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courts have allowed a defendant to bring its summary judgment motion on the eve of trial. For example, in H.J. Heinz Co. v. Beech-Nut Life Savers, Inc., 181 F.Supp. 452 (S.D.N.Y. 1960), the trial court allowed defendants to bring their summary judgment motion "on eve of trial," because such "may well have the salutary effect of narrowing the issues for trial." Id. at 459. In this case, however,Hirai's dismissal would not have "narrow[ed] the issues for trial."

The trial court possesses inherent power to police its docket, Oliva v. Sullivan, 958 F.2d 272 (9th Cir. 1992); Edwards v. Cass County, Tex., 919 F.2d 273 (5th Cir. 1990). The timing of trials and docket control are

matters best left to the discretion of the trial court. Coursen v. A.H. Robins Co., Inc., 764 F. 2d 1329 (9th Cir. 1985), corrected by, 773 F.2d 1049.

The trial court did not abuse its discretion in not hearing defendant Hirai's motion for summary judgment on the day of trial. Hearing the motion would have entailed continuing the trial to another day. A continuance would have required a shifting of the court's docket. Under the circumstances, we do not find an abuse of discretion by the trial court since the issue involved the court's control over its docket.

Hirai also argues that once a valid settlement is reached, the court's duty is to effectuate the intentions of the parties. This argument, however, addresses the underlying substantive issue of whether the settlement agreement is valid and enforceable as a matter of law. Since the trial court, however, made no ruling on the merits of this issue, we need not address it.

6. Plaintiff's Claim for Loss of Consortium.

American Home brought a motion for summary judgment relating to the coverage limits under its insurance policy. In ruling on this motion, the trial court stated that "[p]laintiff admits, through her attorney, that she is no longer pursuing a claim for loss of consortium." See Memorandum Opinion dated April 16, 1991.

We agree with plaintiff's contention that the court erred in dismissing her claim based on her allegedly waiving such claim. We disagree, however, that she and her children are entitled to loss of consortium damages here.

Whether a claim for loss of consortium is considered derivative of a wrongful death claim or not, the common law does not recognize a cause of action for postmortem loss of consortium. Ladd v. Douglas Trucking Co., 523 A.2d 1301 (Conn. 1987); Audubon-Exira Ready Mix, Inc. v. Illinois Cent, Gulf R.R. Co., 335 N.W. 2d 148 (Iowa 1983); Selchert v. Lien, 371 N.W.2d 791 (S.D. 1985); Long v. Dugan, 788 P.2d 1 (Wash. App. 1990), review denied, 791 P.2d 536. Instead, a jurisdiction's wrongful death statute usually provides the exclusive remedy for the decedent's beneficiaries. Millican v. Wolfe, 701 P.2d 107, 109 (Colo. App. 1985), cert. dismissed. 726 P.2d 647 (1986); Ladd, 523 A.2d at 1305; Selchert, 371 N.W.2d at 794. A deceased's spouse and children may recover for losses attributable to loss of love,

affection and guidance, but only if there is a statute that permits such recovery.

In a well-reasoned opinion, Reed v. Pacific Intermountain Express Co., 597 F.Supp. 42 (D.Conn. 1984), the court precluded plaintiff from recovering damages for loss of consortium after the death of her spouse. While acknowledging the policy reasons in favor of allowing the claim to proceed, it declined to do so because the Connecticut legislature failed to provide for loss of consortium recovery pursuant to its wrongful death statute. "[I]t is logical to assume that the passage of a wrongful death statute, creating a right of recovery unknown to the common law, was intended to preclude further judicial initiative." Id. at 45, citing, Justus v. Atchison, 565 P.2d 122, 128 (Cal. 1977), overruled on other grounds by, Ochoa v. Superior Court, 703 P.2d 1,9 (Cal. 1985). On certification from the United States District Court,/18/ the Connecticut Supreme Court agreed with Reed and declined to recognize a right of recovery for post-mortem loss of consortium. Ladd v. Douglas Trucking Co., 523 A.2d 1301 (Conn. 1987)./19/

The Restatement (Second) of Torts Section 925 provides:

> The measure of damages for causing the death of another depends upon the wording of the statute creating the right of action and its interpretation.

Restatement (Second) of Torts Section 693 provides the rule for a spouse's right to recover for loss of society and services.

/18/ Hume v. Hertz Corp., 628 F.Supp. 763 (D. Conn. 1986).

/19/ Connecticut's wrongful death statute is not based on Lord Campbell's Act as is 7 CMC section 2101 et seq. See, discussion below. Nevertheless, the Ladd court found that the legislature had fashioned the remedy for wrongful death in Connecticut. Loss of consortium was not a recoverable loss. Therefore, the court held that the only body which could provide a remedy for loss of consortium was the legislature.

Comment f explains that:

> In the case of death resulting to the impaired spouse, the deprived spouse may recover under the rule stated in this Section only for harm to his or her interests and expense incurred between the injury and death. For any loss sustained as a result of the death of the impaired spouse, the other spouse must recover, if at all, under a wrongful death statute. (Emphasis supplied.)

Because the Commonwealth legislature has provided a statutory remedy for the beneficiaries of the victim of a wrongful death, we are not at liberty to create a right of action, not recognized at common law, for post-mortem loss of consortium in favor of the surviving spouse and children. Therefore, we go on to review our statute to determine whether it allows recovery for loss of consortium as an element of damages recoverable under our wrongful death statute. If it does, the court erred in precluding consideration of the alleged loss. If it does not, then the dismissal of the claim for loss of consortium was correct, but for the wrong reason.

Title 7 of the Commonwealth Code, Sections 2101-2103, provide that the decedent's personal representative may recover damages on behalf of a decedent's beneficiaries for wrongful death. Section 2101(a) provides:

> When the death of a person is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action and recover damages in respect thereof if death had not ensued,... the [party] which would have been liable if death had not ensued ... is liable to an action for damages notwithstanding the death of the person injured ....

Section 2103 provides:

> [T]he Court may award damages as it may think proportioned to the pecuniary injury resulting from the death, to the persons for whose benefit the action was brought ....

Our wrongful death statute stems from and is substantially the same as the Trust Territory wrongful death statute. See, 6 TTC §201-203. The Trust Territory High Court determined that this statute was fashioned after

England's "Lord Campbell's Act"/20/ meaning that "damages are limited to the pecuniary benefits which the beneficiaries might reasonably be expected to have derived from the deceased had his life not been terminated. . . ." Ychitaro v. Lotius 3 TTR 3, 17 (H.C.T.T. Tr. Ct. 1965); see also, Sepeti v. Fitek, 5 TTR 613, 615 (H.C.T.T. Tr. Ct. 1972).

The Trust Territory High Court followed what the majority of states have adopted as the measure of damages applied in wrongful death actions: the "loss to dependents" measure. Dan B. Dobbs, Law of Remedies, §8.4(3) (2d ed. 1993), citing at n. 6, Freeman v. Davidson, 768 P. 2d 885 (Nev. 1989); Calhoun v. Blakely, 564 A.2d 590 (Vt. 1989). These damages are "measured by the support and amenities lost by the victim's dependents or beneficiaries . . . . Contributions made by the deceased from earnings or even from pension income reflect the loss under this measure." Dobbs, §8.3(4) at 431. Whether loss of consortium damages are recoverable in the Commonwealth under this calculus is the issue we must answer.

/20/ See, for example, Sea-Land Services, Inc. v. Gaudet, 94 S.Ct. 806, 812 n.6 (1974) (superseded by statute by, Miles v. Apex Marine Corp., 111 S.Ct. 317 (1990)), where the Court sets forth the Lord Campbell's Act. 9 & 10 Vict., c. 93, An Act for compensating the families of Persons killed by Accidents (Aug. 26, 1846).

Historically wrongful death damages were limited to "pecuniary" losses. Dobbs, §8.3(5). As such, damages for loss of love and affection were not recoverable. Dobbs, §8.3(5), citing at n.1, Miller v. Mayberry, 506 N.E. 2d 7 (Ind. 1987) (action for wrongful death of child). The purpose of the pecuniary loss rule was to prevent "extravagant" jury verdicts based on "sad emotions and injured feelings" instead of actual pecuniary loss. Krouse v. Graham, 562 P.2d 1022, 1026 (Cal. 1977).

Yet, "[m]ost jurisdictions now recognize the 'consortium' recovery for lost companionship, society, love, advice and guidance, either because those elements are considered 'pecuniary loss,' or because the statute specifically permits their recovery, or because the court has judicially

discarded the 'pecuniary loss' limitation." Dobbs, §8.3(5) at 441 (footnotes omitted)./21/

For example, the California Supreme Court in Krouse v. Graham, 562 P.2d 1022, interpreted its wrongful death statute to allow the deceased's spouse to recover for the loss of his wife's "love, companionship, comfort, affection, society, solace or moral support [and] any loss of enjoyment of sexual relations." Id. at 1024./22/

/21/ In a 1974 case, the Supreme Court noted that "27 of the 44 state and territorial wrongful-death statutes which measure damages by the lose sustained by the beneficiaries, permit recovery for loss of society. ... California, Delaware, Michigan, Minnesota, Montana, Pennsylvania, Texas and the Virgin Islands, which either expressly or by judicial construction limit recovery to pecuniary losses have been judicially interpreted, nevertheless, to permit recovery for the pecuniary value of the decedent's society." Sea-Land Services, Inc. v. Gaudet, 94 S.Ct. at 816, n.21.

/22/ California Code of Civil Procedure Section 377 provides for recovery in a Wrongful death action for damages which are "just." Yet, the California courts allowed recovery of only "pecuniary losses" in a wrongful death action. Krouse v. Graham, 562 P.2d 1022 (Cat. 1977). The California Supreme Court labeled damages for loss of "society, comfort and protection" as "non-pecuniary" because they did not have an "ascertainable economic value." In re Air Crash Disaster near Cerritos, Cal., 982 F.2d 1271, 1278 (9th Cir. 1992). Nevertheless, such damages are recoverable if they have pecuniary value. Krouse, 562 P.2d at 1025-26.

It noted that "if damages were truly limited to 'pecuniary' loss, recovery frequently would be barred." Id. at 1026. Notwithstanding, we are constrained by the language of our statute.

The Commonwealth's wrongful death statute grants a cause of action vested in the decedent's personal representative. This cause of action creates a right to relief for damages caused to the "party [fatally] injured."

The statute does not provide a right to relief for derivative injuries, such as loss of consortium, to the adult decedent's surviving spouse or children.

Loss of consortium is a claim for damages suffered by the non-injured spouse./23/ Our wrongful death statute allows only for recovery to the "party injured," that is, the deceased -- not his spouse or children. See, Hunt v. Evenoff, 829 P. 2d 1051, 1052 (Or. App. 1992), review denied, 836 P.2d 1344. ("A wrongful death action may be maintained only under circumstances in which 'the decedent might have maintained an action, had the decedent lived.' ORS 30.020(1) "). Thus, plaintiff's claim that she, as Mr. Ito's wife, and her children are entitled to damages based on loss of consortium fails. Our conclusion is fortified by the 1984 amendment to Section 2103 /24/ which eliminated the former $100,000 recovery limitation for wrongful death actions in the Commonwealth. The amendment indicates to us that, until our statute is further

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/23/ The injured spouse has no claim for loss of consortium. Atkins v. Strayhorn, 273 Cal.Rptr. 231, 239 (Ct. App. 1990) (loss of consortium is a separate claim from a spouse's claim for personal injury). Similarly, assuming that we recognized a separate cause of action for loss of parental consortium for children, the cause would lie with the surviving children, not the injured or deceased parent.

/24/ P.L. 4-16 (effective Oct. 24, 1984). See, Commission Comment to 7 CMC §2103.

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amended to permit recovery of damages for loss of parental and/or spousal consortium, the legislature apparently intended that such damages should remain unrecoverable. Plaintiff's loss of consortium claim therefore has no statutory basis, and the dismissal of the claim, although made for the wrong reason below, shall stand.

7. The Trial Court's Calculation of Damages.

The trial court awarded plaintiff damages of $2,389,857.55 (plus burial expenses). Specifically, the trial court found that "[t]he income that [Ito]

could have been expected to provide to his wife and children over his working life reduced to present, value at an exchange rate of [Yen]126.78/$ is $2,389,857.55." See Findings of Fact No. 72.

Defendants argue that the trial court erred in two respects. First, the trial court failed to explain the approach it applied in calculating plaintiff's damages. Second, the trial court's actual calculation of damages is erroneous.

The two cases relied upon by defendants to support their argument that the trial court must explain its approach in calculating damages, Shaw v. United States, 741 F. 2d 1202 (9th Cir. 1984) and Trevino v. United States, 804 F.2d 1512 (9th Cir. 1986), cert, denied, 108 S.Ct. 70 (1987), were appeals involving allegedly "excessive" damage awards received by the respective plaintiffs under the Federal Tort Claims Act. 28 U.S.C. §1346(b), 267i et seq. ("FTCA"). In both Shaw and Trevino, the Ninth Circuit held that damage awards under the FTCA are reviewed for "clear error."

Trevino, 804 F.2d at 1514-15; Shaw, 741 F.2d at 1205.

The trial court's determination regarding damages is a finding of fact, and, as such, "shall not be set aside unless clearly erroneous." Com.R.Civ.P. 52(a); Reyes v. Ebetuer, No. 90-017 (N.M.I. Jan. 29, 1992). Regarding the application of the clearly erroneous standard to damage awards, the court in Trevino, citing, Shaw, 741 F.2d at 1205, wrote:

> The award is clearly erroneous if, after a review of the record, we are "'left with the definite and firm conviction that a mistake has been committed.'" Id. (quoting, United States v. United States Gypsum Co., [68 S.Ct. 525, 542] (1948)). To determine whether a given award is excessive, we look to the relevant state's case law on excessive awards. Id. The state of Washington considers awards excessive "only if the amount shocks the court's sense of justice or sound judgment" and if it "appears that the trial judge was swayed by passion or prejudice." Id. at 1209. To make that determination, we compare the challenged award to awards in similar cases in the same jurisdiction. Id. The choice of a discount rate, used to adjust to present value an award based on an income stream spread over time and, at the same time,

to adjust for the effects of inflation, should be reviewed for an abuse of discretion. Trevino, 804 F.2d at 1515.

There is no Commonwealth case respecting excessive damage awards. We agree, however, with the approach taken by the courts of Washington state that a damage award should be considered excessive only if the amount shocks the court's sense of justice or sound judgment. Harvey v. Wight, 412 P.2d 335, 337-338 (Wash. 1966). We will also look to insure that the trial judge was not swayed by passion or prejudice. Shaw, 741 F.2d at 1209. If the damage award passes these subjective tests, then we will review for an abuse of discretion the trial court's choice of a discount rate, inflation rate, and any other figures used in calculating a present value award. Trevino, 804 F.2d at 1515. With these guidelines in place, we now turn to defendants' specific contentions regarding the damages awarded in this case.

First, defendants contend that the trial court erred in not revealing the figures it used to calculate the damage award. However, defendants acknowledge that the figures used by the trial court were "adopted verbatim from paragraph 70 of Plaintiff's Proposed Findings of Fact, and it is no surprise that both arrived at a figure of $2,389,857.55." Yamagishi's opening Brief at 44-45.

The Ninth Circuit has criticized the adoption by the federal district courts of a party's proposed findings, and has stated that this practice requires "close scrutiny." See, Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, Int'l Ass'n of Machinist & Aerospace Workers, 886 F.2d 1200, 1204 n. 5 (9th Cir. 1989) (en banc). In this case, however, it was defendants who had the opportunity, but failed, to closely scrutinize the figures used by plaintiff's expert and, later, by the trial court. Plaintiff provided defendants with the name of her damages expert, Dr. Joseph L. Tryon, ten months prior to trial. Dr. Tryon was deposed in April 1992, over a month prior to trial, in lieu of his live testimony. Defendants therefore had Dr. Tryon's testimony in advance of trial. Indeed, at trial, defendants' damages expert attacked the figures used by Dr. Tryon, and on this appeal attack those same figures.

Given these facts and circumstances, we cannot say that the figures and method of calculating damages used by the trial court in determining damages were not known to defendants. The trial court's figures and calculations were not shrouded in mystery, but rather were the subject of

debate in open court. Defendants were aware at all relevant times of the figures and calculations used by Dr. Tryon, and will not now be heard to say that the trial court's adoption of those same figures means that defendants have not been properly apprised of the figures or the court's method of calculating the damage award.

Second, defendants contend that the trial court's damage award is excessive and clearly erroneous. See Yamagishi's Opening Brief at 43. We do not find the trial court's damage award to be so excessive that it shocks our sense of justice or sound judgment. Harvey, 412 P.2d at 337-338. Also, we find nothing in the record which evidences that the trial judge was swayed by passion or prejudice. Shaw, 741 F.2d at 1209. Therefore, we will review the trial court's choice of figures in calculating the present value award for an abuse of discretion. Trevino, 804 F.2d at 1515.

Defendants essentially attack the twenty-one year time frame (1969-1990) used by Dr. Tryon (and followed by the trial court) to calculate a Japanese inflation rate of 9.46%. Defendants contend that this rate is too high and not reflective of the contemporary Japanese economy./25/

/25/ Restatement (Second) Torts Section 913A states:

The measure of a lump-sum award for future pecuniary losses arising from a tort is the present worth of the full amount of the loss of what would have been received at the later time.

We therefore must determine whether the trial court abused its discretion in using the time frame and the resulting inflation rate suggested by Dr. Tryon. Trevino, 804 F.2d at 1515. In applying an abuse of discretion standard, we look to determine whether there has been manifest or gross abuse of discretion by the trial court. Robinson v. Robinson, No. 89-012 (N.M.I. Feb. 5, 1990).

Defendant Yamagishi notes:

> In his deposition, Dr. Tryon appeared to take Ito's salary in 1988 and increase it by 9.46% each year and every year until the year 2012, a twenty-four year period, to conclude that Ito's lost wages, less personal consumption expenses, would have amounted to $2,244,342.00, computed at an exchange rate of [Yen] 135 to the dollar and discounted to present value using an interest rate of 7.14%. (Yamagishi's opening Brief at 45.)

This statement is not completely correct. Dr. Tryon calculated an annual inflation rate of 9.46% by looking to a twenty-one year average (1969-1990) of the Japanese "monthly earning index," which is "a combination of inflation and productivity advances roughly comparable to a combination of the United States consumer price index and the average monthly wage index."/26/

Defendants argue that if Dr. Tryon had used a shorter, more recent time frame, e.g. the last six years, then the Japanese inflation rate would be about 3%, thereby reducing the damage award by approximately $1 million. Yamagishi's opening Brief at 45. Defendants cite Trevino, in which the court wrote that "it is

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/26/ Yamegishi's Brief at 45, citing, R.T. Vol. X, p. 782:1-13. Dr. Tryon used this rate of 9.46% even though his analysis of Ito's actual salary pattern over a 20-year period showed that Ito's salary had actually increased by 12.62% per year. Ito's Respondent's Brief at 39.

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impermissible to select a time period over which to compare inflation and interest rates that provides a decidedly aberrational result." Trevino, 804 F.2d at 1519.

The court in Trevino also wrote:

> We cannot deny history, nor can history provide an always reliable basis for predicting the future.

> However, we can base our estimates on long time periods that will diminish the effect of shorter aberrational periods. Fluctuations that are great for a short time span are less dramatic, and skew results less, when they are seen as part of a longer period. We have no confidence in the ability of experts, the district court, or this court, to predict inflation or interest rates over the period of [plaintiff's] life other than extrapolating from the past. Id. at 1518.

We agree with defendants that, in the past few years, the Japanese economy has slowed, causing a decrease in the Japanese economic growth rates. However, like the court in Trevino, we deem the wiser approach is to look at the long term growth rates in order to "base our estimates on long time periods that will diminish the effect of shorter aberrational periods." Id.

Dr. Tryon and the trial court took such a long-term view, and used a time-reference of 1969-1990 to determine a Japanese inflation rate of 9.46%. While this rate of inflation may seem high by American standards,/27/ the evidence shows it is reasonable when viewed in the economic context of plaintiff's homeland: Japan. For these reasons, we hold that the trial court did not commit a manifest or gross abuse of its discretion in using a time frame of 1969-1990 to determine (and apply in its calculations) an inflation

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/27/ The court in Trevino noted that between 1926-1981, the average annual inflation rate in the U.S. "was around 3 percent." Trevino. 804 F. 2d at 1518, citing, R. Ibbotson & R. Sinquefield, Stocks, Bonds, Bills, and Inflation 15 (1982 ed.).

rate of 9.46%.

2. American Home's Liability Under the Policy.

On March 26, 1991, American Home filed a motion for summary judgment arguing that the extent of its liability is limited to $100,000, the "per person" limit under the subject American Home policy. On April 16,

1991, the trial court declared that coverage for Ito's death under the policy is limited to $100,000, rather than $300,000, the "per accident" limit under the policy. Ito and Yamagishi contend on appeal that the insurance policy limit is $300,000 for Ito's claim of wrongful death. We disagree and find no error.

A. The American Home Policy.

The American Home insurance policy is a comprehensive general liability ("CGL") policy. At the center of this issue are two sections of the policy which relate to American Home's "limits of liability" -- that is, the amount which American Home will pay to the insureds under the policy. The first is Endorsement No. 1 to the policy, which states, in pertinent part:

> LIMITS OF LIABILITY
>
> It is hereby understood and agreed that the Limits of Liability of the Policy are as follows:
>
> Bodily Injury : $ 100,000 - Per Person
> $ 300,000 - Per Accident

The second is the following language from a standard form attached to the policy (referred to herein as "Section III"):

> III. LIMITS OF LIABILITY
>
> Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain bodily injury or property damage, or (3) claims made or suits brought on account of bodily injury or property damage, the company's [American Home's] liability is limited as follows:
>
> Coverage A [for Bodily Injury Liability] -- The total liability of the company for all damages, including damages for care and loss of services, because of bodily injury sustained by one or more persons as the result of any one occurrence shall not exceed the limit of bodily injury liability stated in the schedule as applicable to "each occurrence." (Emphasis not supplied.)

As used in the policy, the term "occurrence means an accident."

B. The Appellants' Arguments. Two arguments are raised on appeal. The first is presented by Appellant Yamagishi./28/ He asserts that the policy is ambiguous as to the meaning of the term "per person" used in Endorsement No. 1. A reasonable construction of the term "per person" includes a person making a claim or bringing suit which arises from someone's bodily injury. Thus, Mrs. Ito and her two children would constitute three such "persons" making three claims arising from Mr. Ito's bodily injury, and the policy therefore provides a total of $300,000 in coverage -- $100,000 for each of the three claims. (Yamagishi's Opening Brief at 12.) This argument was not made to the trial court and is not properly before us, although it is addressed pursuant to the second argument raised on appeal. Estate of Stevenson v. Hollywood Bar & Cafe, Inc., 832 P.2d 718, 721 n.5

/28/ For the insurance coverage issue only, defendant Yamagishi is represented by James M. Grizzard, Esq. of Saipan.

(Colo. 1992) (en banc).

The second argument is presented by Ito with whom appellant Yamagishi joined below. Ito argues that the term "per person" is not defined in the policy. She also argues that Section III of the policy is the only limitation in the policy regarding American Home's liability on a single claim and that limitation is $300,000, not $100,000 as the trial court ruled.

Ito argues here that the "per accident" limitation should apply because of an alleged ambiguity in the policy. Specifically, Ito contends that "since the main body of the policy has no reference to any limitation except $300,000, (per occurrence, the phrase 'per person' standing alone in the endorsement without any definition is meaningless or at a minimum, ambiguous." Ito's Opening Brief at 26.

Ito has taken the position that the term "per person" and the attending limitation set forth in the endorsement should just be ignored. Alternatively, Ito suggests that the limiting term "per person" could mean

"$100,000 per person insured, $100,000 per person making a claim, or even $100,000 [per] person suffering pecuniary loss just as easily as [the trial court's finding that the term means] $100,000 per person injured." Ito's Opening Brief at 32./29/ We find that none of Ito's proffered definitions of "per

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/29/ American Home, on the other hand, argues that (1) the term "per person" as used in Endorsement No. 1 is not ambiguous; (2) even if the term is ambiguous, the $100,000 limit must apply because appellants' alternative constructions are not "reasonable"; and (3) if we find, as appellants suggest, that "per person" means a person making a claim or bringing suit, "the $100,000 Limit still applies because there was never more than one 'claim' or one 'claimant' before the court." See American Home's Respondent Brief at 4-5.

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person" justify her claim that the higher "per accident" limitation should apply.

Appellants acknowledge that American Home's absolute limit of liability under the policy is $300,000 because there was only one "accident," and Endorsement No. 1 provides a maximum of $300,000 for any one accident. In so doing, Appellants acknowledge the validity of Endorsement No. 1 but not the correctness of the trial court's application of it to this claim.

1. One Claim was Made to American Home.

Appellant's alternative definitions for "per person" imply that valid claims were made by Ito's wife and two children. This is not the case.

Plaintiff, as personal representative of the deceased, proceeds in this action pursuant to our wrongful death statute. The decedent's beneficiaries' right to relief is solely provided by statute. Every wrongful death action in the Commonwealth "must be brought in the name of the personal representative of the deceased, but shall be for the exclusive benefit" of the deceased's beneficiaries. 7 CMC §2102. It is the personal

representative who holds a single cause of action against those who are liable for the death of the deceased. Horwell v. Oregon Episcopal School, 787 P.2d 502, 503 (Or. App. 1990); Huntington v. Samaritan Hospital, 666 P.2d 405, 406 (Wash. App. 1983), aff'd 680 P.2d 58 (1984).

We agree with California that an insurer is liable for the single claim of bodily injury to the decedent and not for the multiple non-bodily injury claims of the decedent's beneficiaries, whose damages resulted from the death. In Westfield Ins. Co. v. DeSimone, 247 Cal.Rptr. 291, 293 (Ct. App. 1988), the court reasoned:

> Defendants contend first that the trial court erred in ruling that each heir did not have a separate and distinct cause of action under Code of Civil Procedure section 377. Not so. In Vanguard Ins. Co. v. Schabatka, supra, 46 Cal.App.3d 887, 120 Cal.Rptr. 614, which the trial court expressly relied upon in making its ruling, this court rejected an argument almost identical to the one advanced by defendants in the case here, namely that the decedent's heirs 'were separately injured because of the death of their wife and mother and hence can together make claim on the multiple limits of the policy.' (Id., at p. 893, 120 Cal.Rptr. 614.) We reasoned, in Vanguard, that the heirs, claims did not constitute separate bodily injuries under the policy, but rather separate elements of damages flowing from the single bodily injury of the decedent. (Id., at p. 894, 110 Cal.Rptr. 614.) We then noted that in Campbell v. Farmers Ins. Exch. [67 Cal.Rptr. 175, 177 (1968), overruled on other grounds by, Moncharsh v. Heily & Blase, 832 P.2d 899 (Cal. 1992)], Justice Tamura, writing for this court, had disposed of a similar contention by observing "'... where only one person was killed in an accident, the policy limit was $10,000 [the single injury limit] regardless of the number of heirs damaged.'" (Emphasis not supplied.)

See also, United Services Automobile Ass'n v. Lilly, 266 Cal.Rptr. 691 (Ct. App. 1990); Vanguard Ins. Co. v. Schabatka, 120 Cal. Rptr. 614 (Ct. App. 1975)./30/

Here, there is but one claim for bodily injury, that of the decedent. Only Mr. Ito's personal representative (Mrs. Ito) may recover for that single claim on behalf of herself and the two children, his three

beneficiaries. The decedent's wife and two children do not have separate claims against American Home's

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/30/ We reject plaintiff's assertion that Westfield, (and other cases such as United Services and Vanguard) are inapplicable here. It is true that the policies involved in those cases are distinguishable from the policy here. Nevertheless, the holding that an insurer is liable on a claim for the single bodily injury of the decedent rather than multiple non-bodily injury claims of the decedent's heirs applies here despite the difference in policy language. Any other result would be untenable.

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insureds for the death of Mr. Ito. Moreover, as noted in our discussion in Section 6 above, Mrs. Ito and her children do not have a separate claim for loss of consortium against the negligent defendants./31/ Their sole source of relief is based on the statutory wrongful death claim. Thus, since they have no right to insurance proceeds other than through the claim of Mr. Ito's personal representative, it is Ito's bodily injury upon which liability attaches.

2. The Policy is not Ambiguous.

A policy will be enforced according to its terms by reading it as a whole. Producers Dairy Delivery Co. v. Sentry Ins. Co., 718 P.2d 920, 927, n. 7. (Cal. 1986); United Services Automobile Ass'n, 266 Cal.Rptr. at 692. The exception to this rule is where there is an ambiguity, in which case the ambiguous term is interpreted in favor of coverage. Aim Ins, Co. v. Culcasi, 280 Cal.Rptr 766, 771 (Ct. App. 1991), review denied.

Endorsement No. 1's "per person" limitation of $100,000 is not ambiguous. Simply because a term is not defined does not render it "ambiguous" as plaintiff asserts. It will be afforded its plain and ordinary meaning "against the background of a layman's understanding of the entire policy." Ayres v. Prudential Ins. Co. of America, 602 F. 2d 1309, 1311 (9th Cir. 1979); Aim Ins. Co., 280 Cal.Rptr at 771.

/31/ We do not decide whether loss of consortium is or is not a "bodily injury" for purposes of coverage liability. Under the circumstances presented here, the decedent's heirs do not have a right to damages for loss of consortium.

American Home stated that its limit of liability is $100,000 "per person" for "bodily injury." Only one person suffered bodily injury./32/ That person is Ito, the decedent. Because there is only one bodily injury (death), the limit of liability is $100,000, regardless of the number of heirs claiming damages due to that death.

Even Ito's lawyer admits: "I mean, we deal with these things all the time so, to us, per person, of course, that means the person injured, to a lawyer, but a lay person, unless he is specifically given a definition in the policy, that's what all the cases seem to say." (Tr. April 4, 1991, p. 49:20-24.) We disagree and find nothing technical or ambiguous about the term or its application.

Section III of the policy is also not ambiguous: American Home's total liability is limited to $300,000, the "per accident" limit, "[r]egardless of the number of . . . claims made . . . on account of bodily injury .... " Ito contends that "[t]his policy specifically says we don't care how many people were injured, we will -- we don't care how many beneficiaries there are and anything else, all we care about is that if it's one person or five persons, the maximum amount of money that we will pay is $300,000." (Tr. April 4, 1991, p. 53:16-22.)

Ito focuses on the word "regardless" and asserts that the term means that American Home must pay the "per accident" limit for the

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/32/ American Home does not dispute that the fatal injuries suffered by Ito constitute "bodily injury" under the policy.

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single claim made here./33/ We find nothing ambiguous about the meaning of this provision or the term "regardless." Contrary to plaintiff's assertion, this section was drafted to cap American Home's liability at $300,000 where claims for more than three separate bodily injuries involved in one accident are being made and "total" damages exceed $300,000. Section III's meaning is plain, understandable and reasonable. To rule that this provision sets the limit of liability in this case at $300,000 where there is only one person injured simply because there are three beneficiaries would amount to a "strained" construction of an otherwise reasonably worded provision. Rodriguez v. Safeco Ins. Co. of America, 821 P.2d 849, 851 (Colo. 1991), cert. denied; Klamm v. Carter, 730 P.2d 1099, 1101 (Kan. App. 1986).

Read together, the American Home policy provides coverage of up to $100,000 for a valid claim for damages based on one bodily injury. The policy also provides coverage of up to $300,000 "per accident" no matter how many persons are injured in a particular accident. The plaintiff's contentions that the policy is ambiguous and that the "per accident" limit also applies to a single claim are without merit. Only one claim based on one bodily injury could properly be made by the personal representative of the decedent. American Home is liable for coverage of that claim in the amount not to exceed $100,000. We therefore hold that the trial court did

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/33/ Ito argues that Section III's term "regardless" is significant in defining policy limits: "It says regardless of the number of persons who sustained bodily injury, regardless of the number of persons. It could be one or it could be five." (Tr. April 4, 1991, p. 47:17-19.)

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not err in entering summary judgment in favor of American Home.

V. CONCLUSION.

For the foregoing reasons, we hold that:

1. The release is invalid and failed to exonerate any of the defendants from liability for their negligence;

2. Ito did not impliedly assume the risk of harm arising from defendants, conduct;

3. Ito was not contributorily negligent;

4. The trial court applied the correct standard of care in evaluating defendants' actions;

5. The trial court did not err in denying Hirai's motion for summary judgment based on Hirai's settlement agreement with plaintiff;

6. The trial court did not err in dismissing plaintiff's loss of consortium claim, but did so for the wrong reason;

7. The trial court did not err in its calculation of damages. Further, there was a sound basis for the damages awarded;

8. The trial court did not err in ruling that the coverage provided by the American Home insurance policy was limited to $100,000.

This case is AFFIRMED IN PART, REVERSED IN PART, AM REMANDED to the trial court for the limited purpose of (1) entering an amended judgment against Macro, Yamagishi and Hirai, jointly and severally, in the amount of $2,434,857.55 and (2) determining whether MOE should be held jointly and severally liable to plaintiff based on the theory that MOE is the "alter ego" of Macro.

If the trial court determines that MOE is the alter ego of Macro, it should also enter judgment against MOE, jointly and severally with the other defendants.

Dated at Saipan, MP, this _____ day of _____, 1993.

JOSE S. DELA CRUZ, Chief Justice
RAMON G. VILLAGOMEZ, Associate Justice
BENJAMIN J.F. CRUZ, Special Judge
END K

APPENDIX L

Consolidated Appeal Nos. 92-020 and 92-022

IN THE SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative
of the heirs of AKINOBU ITO, Deceased

Plaintiff,

v.

MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI AND AMERICAN HOME ASSURANCE CO.

Defendants.

ON APPEAL FROM THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

APPELLANT NOBUO HIRAI'S PETITION FOR RE-HEARING

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INTRODUCTION AND SUMMARY OF ISSUES

Defendant, appellant, and petitioner Nobuo Hirai (hereinafter "Hirai") hereby petitions the Supreme Court of the Commonwealth of the Northern Mariana Islands (hereinafter "this Court") for a re-hearing pursuant to this Court's Rules of Appellate Procedure, Rule 40, on the grounds that the Court has overlooked or misapprehended particular points of law and fact in its written opinion filed herein on October 26, 1993.

A. The Plaintiff-Hirai Settlement Agreement - Due Process

First, with respect to the plaintiff-Hirai settlement agreement, this Court mistakenly states that:

> **Hearing the notion [to enforce a written settlement agreement] would have entailed continuing the trial to another day. A continuance would have required a shifting of the court's docket. (This Court's opinion, p. 35.)**

There is no evidence in the record, and in fact it is not accurate, that hearing Hirai's complete defense on the basis of the settlement agreement, the most important aspect of this case to this defendant, would have entailed continuing the trial to another day, or shifting the Court's docket. That is a misapprehension of fact. Defendant Hirai asked "five minutes" of the Court's time. (Excerpts of Record, 51:10-12, Reporter's Transcript of Trial, May 26, 1992, 10:10-12.)/1/ Furthermore, while the "timing" of trials and hearings is within the discretion of the trial court as set forth in the cases cited by this Court /2/, the trial court does not have discretion to deny without consideration any hearing of a valid and enforceable settlement agreement which is dispositive of the case with respect to the moving defendant. To refuse to hear this defense, as set forth in a formal motion attached to briefs served and submitted to the trial court, is a violation of due process.

Furthermore, this Court misapprehends the ruling of the trial court. The trial court did not simply refuse to hear Hirai's strongest defense (a clear violation of due process in itself); the trial court "denied" it on the grounds that it did not want to hear it. The Court expressly stated that the notion was "denied." (ER, 53:17-20; RT, May 26, 1992, 12:17-20.) Accordingly, this Court's decision that it did not need to roach the merits of the action because it was never ruled upon is a misapprehension of fact.

This Court has remanded this case to the trial court for the limited purpose of a hearing on the application of the alter ego doctrine to the previously dismissed defendant, Marianas Ocean Enterprises (hereinafter "MOE").

/1/ Excerpts of Record and Reporter's Transcript of Trial are hereinafter referred to as "ER" and "RT" respectively.

/2/ Oliva v. Sullivan 958 F.2d 272 (9th Cir. 1992); Edwards v. Cass County, Texas 919 F.2d 273 (5th Cir. 1990); Coursen v. A.H. Robbins Co., Inc. 764 F.2d 1329 (9th Cir. 1985) corrected by 773 F.2d 1049.

Defendant Hirai requests that this court reach the merits of the plaintiff-Hirai settlement agreement and instruct the trial court to enter judgment in favor of defendant Hirai on the grounds of said settlement agreement. Alternatively, petitioner requests that at the time this Court remands this case in part to the trial court for a hearing on the application of the alter ego doctrine, this Court also remand petitioner Hirai's defense of the plaintiff-Hirai settlement agreement for a hearing.

B. Contractual Waiver And Release

In this case, the Court has overlooked defendant Hirai's lead argument on appeal: that plaintiff's decedent signed a Contractual Waiver and Release. This legal argument is not subsumed into the argument regarding express assumption of risk, disposed of by this Court. The theory of contractual release is a separate theory of a different nature. It was sot forth separately as defendant Hirai's lead argument. Yet, it was overlooked by this Court. Petitioner Hirai hereby requests that this Court address its lead argument and enforce the contractual waiver of claims.

C. Due Process Violations Associated with Imposing judgment Upon A Party Not Present At Trial

Finally, this Court's opinion overlooks the due process problem associated with imposing the trial court's judgment against parties not present at trial. This Court discusses the fact that Macro Energy, Inc.'s (hereinafter "Macro") liability is vicarious liability for the acts of its employee. However, the Court makes a sweeping assumption that due process allows a plaintiff to successfully prosecute an action against an employee and then, subsequent to the trial, impose that judgment against an employer not present at trial. Despite substantial briefing on this matter, the Court does not address this due process problem. Defendant Macro's Petition for Re-Hearing on this issue is well taken.

Furthermore, a new trial against Macro, which should properly be granted, will necesitate a new trial as against all defendants for the reasons set forth in defendant Hirai's supplemental briefing. Specifically, defendants Macro and MOE are entitled to their day in court. But with this right comes the threat that a new trial against Macro and MOE will result in an inconsistent judgment from that entered against defendants Hirai and Yamagishi. Accordingly, the judgments against Hirai and Yamagishi should be vacated and the entire action should be remanded for re-trial.

II. ARGUMENT

A. The Plaintiff-Hirai Settlement Agreement - Due Process

This Court appears to be acting under the misapprehension that the trial court simply decided that it would hear Hirai's defense on the grounds of the plaintiff- settlement agreement at a time other than the first day of trial for the convenience of the court's docket. This is not the case. Defendant Hirai's strongest defense, the plaintiff-Hirai settlement agreement, was "denied" because the trial court did not choose to hear it. The trial court ruled against enforcing the settlement agreement, without considering it on the grounds that it thought the matter should have been addressed before trial, not at trial.

On the first day of trial, counsel for Hirai asked to be heard on the plaintiff-Hirai settlement agreement stating:

> If we can just have five minutes on that motion, because we thought the offer had been made and accepted.
> (ER, 51:1-12; RT, May 26, 1992, 10:10-12; emphasis added.)

The Court repeatedly noted that a notion on the settlement agreement had never been heard and that:

> Before you bring [this] up before the court, you have to notice this thing, and set it for hearing.
> (ER, 51:16-17; RT, May 26, 1992, 10:16-17.)

Counsel for Hirai responded with a reasonable explanation for the delay of the hearing in light of the fact that certain issues on summary judgment had been certified under Rule 54(b) after the motion for summary Judgment on the settlement agreement was noticed but before the hearing. When the case was remanded back to the trial court after the Supreme Court refused to hear the interlocutory appeal, the trial court, Judge Castro presiding, instructed that it did not want to hear any more law and motion matters before trial. (ER, 51:18-52:12; RT, May 26, 1992, 10:18-11:12.) /3/

Counsel for defendant Hirai simply requested a hearing of this very important defense, if not on the first day of trial then at some time:

> If your Honor is willing to hear it today or at some point during the trial, we'd like to argue it. If your Honor would prefer that it be a matter of proof at sometime during the trial, then that would be acceptable to us, too. But there is a reason for why it hasn't been heard yet, and that was scheduling difficulties, and an agreement of counsel that the hearing wouldn't go forward until Mr. Hirai's deposition could be retaken.
>
> (Ibid; emphasis added.)

The Court responded:

> We have about seven files this thick here, and these are matters that should have been taken up before trial. That's why I asked the parties, 'are you ready for trial?' Now, at this point, to entertain this action, the court will not . . . will deny the notion.
> (ER, 53:17-20; RT, May 26, 1992, 12:17-20; emphasis added.

Obviously, the trial court did not simply put off a hearing on this issue to a more convenient time. It "denied" enforcing the settlement agreement on the grounds that hearing the matter at trial was inconvenient. The court

---

/3/ There was no law and motion cut-off, either by local rule or court order in this matter other than Judge Castro's instruction that the court did not want to hear any more law and motion matters prior to trial.

refused to hear Hirai's defense because it believed the matter should have been resolved in pre-trial proceedings.

In this Court's opinion regarding the plaintiff-Hirai settlement agreement at pgs. 34-35, this Court cites three cases for the proposition that the trial court possesses inherent power to police its docket and that the timing of trials and docket control are matters best left to the discretion of the trial court: Oliva v. Sullivan 958 F.2d 272 (9th Cir. 1992); Edwards v. Cass County, Texas 919 F.2d 273 (5th Cir. 1990); Coursen v. A.H. Robbins Co., Inc. 764 F.2d 1329 (9th Cir. 1985) corrected by 773 F.2d 1049.

However, these cases in no way support the trial court's refusal to allow a hearing of Hirai's strongest defense, a written settlement agreement. In Oliva v. Sullivan, supra, the Ninth Circuit Court of Appeals hold that the District Court abused its discretion when it put its inherent power to control its docket ahead of the rights of the parties to be heard on the merits. In that case, the local rules and the trial court's instructions provided that plaintiff should have filed a notion for summary judgment by August 6, 1987; plaintiff did not do so. Accordingly, the trial court dismissed the action. The Court of Appeal reversed, holding:

> . . . the public policy favoring
> disposition on the merits weighs against
> dismissal.
> (Oliva at p. 274.)

Oliva certainly does not stand for the proposition that parties such as defendant Hirai may not have their defenses heard on the merits at the whim of the trial court.

In Edwards v. Cass County, Texas, supra, once again, the holding does not support the trial court's decision. In Edwards, the trial court refused to hear an untimely motion for summary judgment. The defendant and moving party filed an interlocutory appeal. The Court of Appeal held, simply, that an interlocutory appeal was not proper, and that the defense should properly be raised as Hirai's defense was raised: at trial. The court held:

> Having failed to take the appropriate measures to test the legal issue of immunity (the basis of the motion for summary judgment] prior to trial, these defendants must stand trial, unless on remand the district court should elect to consider their action for summary judgment and should determine that qualified immunity is present.
>
> Out of an abundance of cautions, however, we note that the defendants still may assert qualified immunity at trial.
> (Edwards at p. 277; emphasis added.)

In the case at bench, the defense was presented at trial. This in not an interlocutory appeal. This is an appeal after a trial in which the trial court refused to hear petitioner Hirai's best defense.

In the third case cited by this Court on the issue, Coursen v. A.H. Robbins, Co., Inc., 764 F.2d 1329 (9th Cir. 1985) corrected by 773 F.2d 1049, the appellant contended that she was prejudiced because the trial court rescheduled her trial from February 14, 1984 to February 10, 1984. The court stated broadly that:

> The timing of trials and control of the docket are matters left to the discretion of the trial court.
> (Coursen at p. 1340.)

This case stands for the proposition that a trial court may control the timing of its trials and control the docket. It does not stand for the proposition that if a party presents a defense at an inconvenient time, the defense may simply be "denied". Once again, the Coursen case, like Edwards, supra and Oliva, supra cited by this court, do not support the trial court's summary denial of petitioner Hirai's a best defense.

Due process of law under the Fifth and Fourteenth Amendments to the United States Constitution requires that parties have an opportunity to defend, enforce, and protect their rights. The guarantee of due process of law is one of the most important to be found in the Constitution, and it has

been said that without such guarantee, the right of private property could not be said to exist in the sense in which it is known to our laws. (Ochoa v. Hernandez 230 U.S. 139 (1913).) Due process is not interested in mere technical formalism; it is, rather, the substance that is determinative of whether due process has been afforded. It is not a technical conception with a fixed content unrelated to time, place, and circumstances, but rather expresses the requirement of fundamental fairness. (Lassiter v. Dept. of Social Services 452 U.S. 18 (1981).)

One of the essential elements of procedural due process is an opportunity for hearing. It is a cardinal principal of due process that no one may be bound by a judgment, either in respect to his or her person or property unless that person has had his or her day in court. In other words, a person may not be so bound until he or she has been afforded an opportunity to be heard. As the United States Supreme Court has stated:

> The right to a hearing . . . is one of
> the 'rudiments of fail play' . . .
> assured . . . by the 14th Amendment . . .
> . There can be no compromise on the
> footing of convenience or expediency . . .
> when that minimal requirement has been
> neglected or ignored.
> (Ohio Bell Telephone Co. v. Public
> Utilities Com. 301 U.S. 292, 304-305
> (1937); emphasis added.)

In the case at bench, the trial court denied defendant Hirai's right to a hearing on his strongest defense Non the footing of convenience or expediency". (Ohio Bell, supra.) It in difficult to imagine a clearer case of denial of due process and abuse of discretion. In light of these fact, petitioner respectfully requests that this court reconsider its ruling with respect to the Plaintiff-Hirai settlement agreement. This case is already going to be remanded in part for a hearing on the application of the alter ago doctrine with respect to the previously dismissed defendant MOE.

Defendant Hirai requests that this court reach the merits of the plaintiff-Hirai settlement agreement and instruct the trial court to enter judgment in favor of defendant Hirai on the grounds of said settlement agreement. Alternatively, petitioner requests that at the time this Court remands this case in part to the trial court for a hearing on the application

of the alter ego doctrine, this Court also remand petitioner Hirai's defense of the plaintiff-Hirai settlement agreement for a hearing.

B. Contractual Waiver And Release

This Court's opinion overlooks defendant Hirai's lead argument on appeal: that plaintiff's decadent signed a contractual waiver and release stating:

> IN CASE OF ACCIDENT, CAUSING INJURY OR DEATH TO MYSELF, I MYSELF, MY FAMILY, OR INHERITED ORGANIZATION AND OTHER RELATED PERSONNEL SMALL HAVE NO RIGHT TO PROTEST AGAINST NOR TO CLAIM FOR DAMAGES.

This Court's only acknowledgment of defendant Hirai's defense based upon the law of contract appears during its analysis of Ito's express assumption of risk at p. 17:

> There is no dispute that the release is either a 'contract' or a document by which Ito may have 'otherwise expressly agree[d]' to assume certain risks.

This Court appears to subsume defendant's legal argument regarding contractual waiver and release into defendants legal argument regarding express assumption of risk. This constitutes a grave misapprehension of defendant's legal argument and the applicable law. The contractual theory of waiver and release is quite different in nature and separate from that of express assumption of risk.

The law of express assumption of risk embodied in Restatement of Torts, 2d 496B, is not contractual in nature. It is a defense sounding in tort.

The defense of contractual waiver and release obviously sounds in contract, not tort. The difference in this case in significant. The issue before this court on express assumption of risk is: what risks did Ito expressly assume? This Court has hold that Ito did not expressly assume negligence since the word "negligence" is not specifically used.

The issue with respect to contractual waiver and release in quite different: does a contract which expressly waives the right to claim damages do so?

To merely hold that all waiver and release contracts must specifically describe the legal theories under which damages may not be claimed would be a dangerous precedent. If that were the law, all settlement agreements which expressly waive the right to claim damages would be invalid unless they went on to state that the signatory waived the right to claim damages under theories of negligence, contract, specified statutes, etc. That is not a requirement for an enforceable contractual waiver and release. Furthermore, under the law of contract, it should not be required. The rules of interpretation of contract, as expressed in the Restatement of Contract, 2d and codified by 7 CMC §3401, require courts to give meaning to the objectively expressed intentions of the parties. There can be no question that a contractual waiver of claims for damages means what it says.

In light of this Court's overlooking defendant Hirai's separate and lead argument on appeal, petitioner requests that this Court reconsider and address this legal argument.

C. Due Process Violations Associated With Imposing Judgment Upon A Party Not Present At Trial

Finally, this Court's opinion Overlooks the due process, problem associated with imposing the trial court's judgment against parties not present at trial, i.e. Macro and MOE. This Court discusses the fact that Macro's liability is vicarious liability for the acts of its employees. (Opinion at p. 24.) However, the Court makes a sweeping assumption that once a judgment is entered against an employee, then, subsequent to trial, one may impose that judgment against an employer who was not present at trial. The imposition of a $2.4 million judgment upon parties not present at trial has severe due process ramifications. Despite substantial briefing by the parties on this issue at the request of this Court, the Court's opinion does not address this due process issue.

Defendant Macro's Petition for Re-Hearing on this issue is well taken. Defendant Hirai concurs that it is a violation of due process to impose this judgment upon Macro and possibly MOE who are not parties at trial.

Furthermore, a new trial against Macro will necessitate a new trial as against all defendants including Hirai for the reasons set forth in defendant Hirai's supplemental briefing. Specifically, due process dictates that defendants Macro and MOE are entitled to their day in court. But with this right cones the threat that a now trial against Macro and MOE will result in an inconsistent judgment from that entered against defendants Hirai and Yamagishi and a violation of due process. Accordingly, the judgments against Hirai and Yamagishi should be vacated and the entire action should be remanded for re-trial. Petitioner Hirai respectfully requests that this Court address this fundamental and thoroughly briefed issue.

III. CONCLUSION

For the foregoing reasons, defendant, appellant, and petitioner Nobuo Hirai respectfully requests that this Court grant a re-hearing pursuant to rules of Appellate Procedure, Rule 40, and address certain particular points of law and fact which this Court has overlooked and misapprehended.

Respectfully submitted this day of November, 1993.

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END L

APPENDIX M

IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative of the Heirs of AKINOBU ITO, Deceased,	)APEAL NOS. 92-020 & 92-022) Consolidated))CVIL ACTION NO. 89-918
Plaintiff/Appellee/ Cross-Appellant,	)
V.	) ORDER DENYING A RE-HEARING
MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI, AMERICAN HOME ASSURANCE COMPANY,	)
Defendants/Appellants/ Cross-Appellees.	)

BEFORE: DELA CRUZ, Chief Justice; VILLAGOMEZ, Justice;
and CRUZ, Special Judge

We have reviewed the two petitions for rehearing filed by appellants. Macro Energy, Inc. ("Macro") and Shigemi Yamagishi, and by Nobuo Hirai. After reviewing their memoranda in support of rehearing, we are not persuaded that we have overlooked or misapprehended the pertinent points of law or fact. Com.R.App.Pro. 40.

In particular, Macro's contention that its due process rights were violated is without merit. While it is true that a corporation is a distinct "jural entity," we disagree with the assertion that Macro is entitled to a full trial on the issues of negligent conduct and liability before judgment may be entered against it, for here, it was being sued on respondeat superior grounds.

Macro's petition fails to address why it should not be held liable to the plaintiff for the negligent acts of Yamagishi and Hirai (its employees and agents) on the theory of respondeat superior. While Macro states that "it could have amended its answer" to allege that Yamagishi and Hirai acted

outside the scope of their employment with regard to Ito's death (Macro/Yamagishi Brief at 13), it does not assert a position that either Hirai or Yamagishi acted outside the scope of their employment, much less provide any factual predicate to support such a proposition. Macro's petition merely reasserts most of the issues that have been considered and resolved at trial and on appeal, i.e. whether Yamagishi and Hirai negligently caused the death of Akinobu Ito.

Hirai's due process argument regarding the issue of the settlement agreement is being raised for the first time in his petition for re-hearing. We shall not address this issue which was not raised below or earlier with us. In re estate of DeLeon Guerrero, 1 N.M.I. 325, 326 n.2, No. 89-017, slip op. at 2 n.2 (N.M.I. Aug. 24, 1990) (order Denying Petition for Rehearing).

The petition for re-hearing, therefore, is DENIED.

Dated at Saipan, MP, this day of 1993.

JOSE S. DELA CRUZ, CHIEF JUSTICE
RAMON G. VILLAGOMEZ, ASSOCIATE JUSTICE
BENJAMIN J.F. CRUZ, SPECIAL JUDGE

END M

APPENDIX N

Consolidated Appeal Nos. 92-020 and 92-022

IN THE SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RYOKO ITO, as Personal Representative
of the heirs of AKINOBU ITO, Deceased

Plaintiff,

v.

MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI AND AMERICAN HOME ASSURANCE CO.

Defendants.

ON APPEAL FROM THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

NOTICE OF APPEAL OF DEFENDANT AND APPELLANT NOBUO HIRAI

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NOTICE IS HEREBY GIVEN that Nobuo Hirai, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 26th day of October, 1993 by the Supreme Court of the Commonwealth of the Northern Mariana Islands (hereinafter "CNMI"), and from the Order

denying defendant's Motion for Re-Hearing, made and entered November 23, 1993 in the Supreme Court of the CNMI pursuant to Rule 40 of the Rules of Appellate Procedure of the CNMI Supreme Court.

Respectfully submitted this day of December, 1993.

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END N

APPENDIX O

Consolidated U.S. Court of Appeals Docket No.: 94-15188
Lower Court Docket No.: CV-92-00020

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RYOKO ITO, as Personal Representative
of the heirs of AKINOBU ITO, Deceased

Plaintiff,

v.

MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI AND AMERICAN HOME ASSURANCE CO.

Defendants.

ON APPEAL FROM THE SUPREME COURT
OF THE
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I.
INTRODUCTION

This case presents unusual due process issues resulting from an unusual procedural history. Among the problems, some defendants were dismissed prior to trial then later made responsible for the judgment entered without them. Also, the principal defense of one of the defendants was denied without a hearing.

The focus of the case prior to trial was an "Agreement for Exemption from Obligation" which contained an express assumption of risk. Plaintiff's decedent Ryoko Ito (hereinafter "Ito") signed it prior to scuba diving in the ocean off Saipan where he drowned (ER 1)/1/. The trial court, in law and motion, originally granted summary judgment with respect to all defendants based upon that written release (ER 12).

Upon a motion for reconsideration, the trial court amended its order, still dismissing the defendant dive shop Macro Energy, Inc. (hereinafter, "Macro") and its parent company Marianas Ocean Enterprises (hereinafter, "MOE"), but, surprisingly, bringing the dive shop's employees, Nobuo Hirai (hereinafter "Hirai") and Shigemi Yamagishi (hereinafter, "Yamagishi"), back into the case.

/1/ Hereinafter Excepts of Record shall be abbreviated "ER," Certificate of Record by Clerk filed in the Superior Court on October 9, 1992, is abbreviated as "CR" and is followed by the filing date and time of the particular document referred to herein, and Reporter's Transcript shall be abbreviated as "RT".

The trial court's reasoning was that the employer was mentioned in the Release but the employees were not (ER 26-30).

The trial court certified the issues on the motion for summary judgment for interlocutory appeal pursuant to Rule 54b. However, the Commonwealth of the Northern Mariana Islands (hereinafter, "CNMI") refused to hear the interlocutory appeal (ER 79), a questionable decision which later resulted in some of the extreme due process problems discussed below.

Prior to the Rule 54b certification, plaintiff made a written offer of settlement to Hirai which he promptly accepted in writing (ER 31-44). Plaintiff later attempted to rescind that offer after acceptance (ER 44). Hirai filed a motion for summary judgment to enforce the settlement agreement (ER 79). Before the motion could be heard the interlocutory appeal caused a disruption and stay of proceedings and Hirai's motion was put off until the day of trial (ER 79). This was not a violation of local rules or court order. There is no law and motion cut-off in the CNMI. Nevertheless, on the first day of trial, the trial court denied the motion without a hearing.

The trial proceeded against Hirai and Yamagishi alone. There was a great deal of discussion and disagreement about which standard of care should be used. Hirai and Yamagishi argued for a local standard of care which was similar to the Japanese standard of care. (The defendant is a Japanese citizen.) At the end of trial, the court chose a foreign standard of care.

The trial court found for the plaintiff and against Hirai and Yamagishi and entered judgment in excess of $2 million.

Hirai and Yamagishi appealed to the Supreme Court of the CNMI; plaintiff cross-appealed. Hirai argued that the "Agreement for Exemption

from Obligation" which released Hirai's employer should release him as well (ER 1). This was supported by a great deal of legal authority as well as common sense. Ito cross- appealed, arguing that Macro and MOE should never have been dismissed by the express release and assumption of risk and that they should be brought back into the case. Hirai responded that if Macro and MOE were brought back into the case, they would be entitled to a new trial since they were not present at trial and that would mean a new trial with respect to all defendants since you can only have one judgment arising out of a single action.

After briefing and argument, the Supreme Court for the CNMI made the following decisions: First, the Court found that the express release and assumption of risk was completely invalid because it failed to use the word "negligence". Second, the Court found that the judgment in excess of $2 million should simply be imposed upon Macro and MOE despite the fact that they were not present at trial. Third, the Court found that the trial court did not have to hear Hirai's motion to enforce his written settlement agreement, on the grounds that the trial court's right to control its docket superseded Hirai's right to a hearing.

Hirai petitioned for Re-Hearing on the principal grounds that the Supreme Court's opinion elevated "docket control" over Constitutional due process. The Supreme Court responded that it did not need to concern itself with the due process implications of its decision because "due process" had not been raised before, though Hirai had repeatedly argued the improper denial of a hearing in both the trial court and the Supreme Court.

The principal issues now before this Court of Appeal are whether Hirai is entitled to a hearing on his written settlement agreement; whether the judgment can simply be imposed upon Macro and MOE though they were not present at trial; and whether the Supreme Court's rulings regarding the express assumption of risk and the standard of care represent a capricious and inequitable application of the law amounting to a deprivation of due process.

II.
STATEMENT OF JURISDICTION

The superior court had jurisdiction over this matter by virtue of 1 CMC §3202.

The Supreme Court of the Commonwealth of the Northern Mariana Islands had jurisdiction over this matter by virtue of the final, amended judgment entered in the Superior Court against defendants on August 10, 1992 (ER 62). The statutory basis for jurisdiction of the Supreme Court of the CNMI is found at 1 CMC §3102(a).

This court has jurisdiction over this appeal by virtue of 48 U.S.C. §1694c(a) in that this appeal involves the denial of due process guaranteed by the 5th and 14th Amendments of the Constitution of the United States which apply to the CNMI. (Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (the Covenant), Article V, Section 501(a).)/2/ The Covenant grants this court jurisdiction of decisions such as the one at bench involving the Constitution of the United States. (The Covenant, supra, Article III, Section 403.)/3/

/2/ Section 501(a) reads as follows:

> To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several states . . . . . Amendments I through IX, inclusive; . . .Amendment XIV. . . .

/3/ The Covenant, Article III, Section 403(a) provides in pertinent part:

> For the first 15 years following the establishment of an appellate court of the Northern Mariana Islands the United States Court of Appeal for the judicial circuit which includes the Northern Mariana Islands will have jurisdiction of appeals from all final decisions of the highest court of the Northern Mariana Islands from which a decision could be had in all cases involving the Constitution, Treaties or laws of the United States, or any

(footnote continued)

Hirai's Notice of Appeal to this court was filed on December 22, 1993, twenty-nine (29) days after the entry of the November 23, 1993 Order Denying a Re-Hearing pursuant to Rule 40 of the Rules of Appellate Procedure of the CNMI Supreme Court (ER 172).

This appeal is from both the judgment and opinion of the Supreme Court of the CNMI entered on October 28, 1993 (ER 94-150) and from the Order Denying Re-Hearing of that judgment and opinion filed November 23, 1993 (ER 169-171). Circuit Rule 6-1(b)(i) provides that the timely petition for Re-Hearing under Rule 40 of the Rules of Appellate Procedures of the CNMI Supreme Court extends the time for filing the Notice of Appeal to thirty (30) days after the denial of the Petition for Re-Hearing. Therefore, this appeal is timely under Rule 4(a) of the Federal Rules of Appellate Procedure for appeal from both the Order Denying a Re- Hearing and the earlier filed Judgment and Opinion. ////

(footnote continued from previous page)
authority exercised thereunder. . ..

This rule was reaffirmed in the Commonwealth Judicial Reorganization Act of 1989, 1 CMC, Div. III, Section 3103 which states in pertinent part:

> The decision of the Supreme Court is final and may not be appealed to any other court, except as provided in Section 403(a) of the covenant.

III.
STATEMENT OF ISSUES PRESENTED

A. WHETHER THE COURT ERRED IN DENYING A MOTION TO ENFORCE A WRITTEN SETTLEMENT AGREEMENT ON THE GROUNDS THAT IT WAS INCONVENIENT TO HEAR IT DURING TRIAL AND SHOULD HAVE BEEN RAISED BY PRETRIALMOTION

Federal Constitutional due process is a legal determination reviewable De Novo. In re U.S. Financial Securities Litigation, 729 F.2d 628, (9th Cir. 1984).

B. WHETHER DEFENDANTS MACRO AND MOE, WHO WERE NOT PARTIES AT THE TIME OF TRIAL, ARE ENTITLED TO A NEW TRIAL ON THE MERITS, AND IF SO, WHETHER DEFENDANT HIRAI IS ENTITLED TO A NEW TRIAL ON THE MERITS TO AVOID INCONSISTENT JUDGMENTS WHICH VIOLATE DUE PROCESS

Federal Constitutional due process is a legal determination reviewable De Novo. In re U.S. Financial Securities Litigation, 729 F.2d 628, (9th Cir. 1984).

C. WHETHER THE CNMI SUPREME COURT'S RULINGS REGARDING THE EXPRESS ASSUMPTION OF RISK AND STANDARD OF CARE REPRESENT A CAPRICIOUS AND INEQUITABLE APPLICATION OF THE LAW AMOUNTING TO A DEPRIVATION OF DUE PROCESS

Federal Constitutional due process is a legal determination reviewable De Novo. In re U.S. Financial Securities Litigation, 729 F.2d 628, (9th Cir. 1984).

IV.
STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a wrongful death lawsuit filed by Ryoko Ito, as personal representative of the heirs of Akinobu Ito, who died in a September 24, 1988 scuba diving accident at a popular Saipan dive site known as the "Grotto" (ER 2).

B. COURSE OF PROCEEDINGS

Plaintiffs' claims were originally brought against five (5) defendants: Macro, a dive shop, Hirai, an assistant instructor employed by Macro, Yamagishi, a scuba diving instructor and Macro's president MOE, alleged to be the alter ego of Macro, and American Home Assurance Company (hereinafter "American Home") Macro and Yamagishi's insurer (ER 2-8).

On November 7, 1990, Macro, Hirai, Yamagishi, and American Home moved for summary judgment under §496B of the Restatement of Torts, 2d on the basis of an "Agreement for Exemption from obligation" (i.e., a release agreement sometimes called a "covenant not to sue" or a "wavier of liability") signed by Ito on the morning of his accident (ER 1; 71; CR 11/7/90, 00:00:00).

On December 17, 1990, Judge Robert A. Hefner granted summary judgment in favor of Macro, Hirai, Yamagishi, and American Home (ER 12). The court did not address MOE in the judgment, or its Memorandum Decision, but the implication was that it too was dismissed (ER 13-25).

On December 27, 1990, plaintiff moved for reconsideration of the order granting summary judgment arguing that Ito's assumption of risk was not sufficiently "expressed" under § 496B of the Restatement of Torts, 2d (ER 72; CR 12/27/90 9:16:09; 12/28/90 11:50:26).

On January 28, 1991, the Court entered an "Amended Summary Judgment" and "Memorandum Decision" (ER 26-30). Judge Hefner held, upon further review that although the agreement effectively operated to release Macro from liability, it did not release Yamagishi or Hirai, Macro's employees, since they were not named in the release agreement. Since MOE was alleged to be the alter ego of Macro, MOE along with Macro was dismissed. Although the status of American Home was unclear. the case was reinstated against it was well (ER 26-30).

On June 21, 1991, plaintiff offered to settle with Hirai, on the conditions that "(a) Mr. Hirai will meet with [an] expert of plaintiff's choosing to discuss the events surrounding this case and his employment in Saipan" and "(b) Mr. Hirai agrees to testify at the trial" (ER 36). On June 25, 1991, Hirai unconditionally accepted the offer in writing (ER 39-42). A day later, June 26, 1991, plaintiff's counsel purported to orally revoke the offer; on June 27, 1991, he sent a letter purporting to withdraw it (ER 44)

On September 9, 1991, American Home moved, pursuant to Rule 54(b) of the Rules of Civil Procedure, for certification of the Superior Court's January 28, 1991 Amended Summary Judgment on the "release issue", and for certification of the court's April 16, 1991 order on the policy limits issue (ER 79; CR 9/10/91 13:29:59).

On September 12, 1991, Hirai filed a motion to enforce the settlement agreement (ER 79; CR 9/12/91 11:45:48.)

On October 7, 1991, the trial court certified for appeal Judge Hefner's order of January 28, 1991 on the release issue and Judge Hefner's order of April 16, 1991 on the policy limits issue (ER 79; CR 10/7/91 15:39:37).

The notices of appeal which followed the Rule 54(b) certification had the effect of staying all proceedings in the Superior Court, including Hirai's motion to enforce the settlement agreement. On November 6, 1991, the parties formally stipulated to such a stay (ER 80; CR 11/6/91 13:51:11).

On February 3, 1992, the CNMI Supreme Court dismissed all of the appeals on the grounds that the orders sought to be reviewed were insufficiently final within the meaning of Rule 54(b).

On February 7, 1992, plaintiff scheduled Hirai's second deposition for March 5, 1992 (ER 80; CR 2/10/92 15:44:47 /4/). On February 17, 1992, the parties stipulated to a May 26, 1992 trial date (ER 80; CR 2/19/92 11:32:58).

/4/ Shortly after the motion to enforce the settlement had been filed, plaintiff's counsel and counsel for Mr. Hirai agreed that the hearing on the motion would be postponed until plaintiff's counsel could re-depose Mr. Hirai (CR 10/9/92 8:2:42, RT 5/26/92 11:13-24).

On April 7, 1992, a hearing was scheduled on defendants' Motion for Summary Judgment based on the doctrine of assumption of risk and on their Motion for Reconsideration of Judge Hefner's amended summary judgment decision on the release agreement. Judge Castro declined to entertain the motions on their merits, denying them on the grounds that they had been filed too close to trial, then over a month and a half away (ER 84; CR 10/9/92 7:50:29). No motion cut off date had ever been set by the court. Hirai was re-deposed by plaintiff two days later on April 9, 1992.

On May 22, 1992, defendants filed their Pretrial Memorandum, in which they noted that Hirai's Motion to Enforce the Settlement Agreement was still pending. Defendant Hirai requested that the motion be heard prior to trial or on the day of trial prior to testimony (ER 82; CR 5/22/92 11:17:50). The motion memorandum and affidavit in support of Motion to Enforce the Settlement were filed with the Pretrial Memorandum (ER 66-67; CR 5/22/92 11:17:50).

On May 26, 1992, on the first day of trial, just before opening statements, Hirai's motion on his settlement agreement was denied without a hearing on the grounds that it was inconvenient to hear it during trial and should have been raised by pretrial motion (ER 64-68).

On June 22, 1992, after a two week trial between May 26, 1992 and June 5, 1992, the court entered judgment in the approximate amount of $2.4 million against Hirai, Yamagishi and American Home (ER 46). On August 10, 1992, after American Home's June 29, 1992 Motion to alter or Amend the Judgment (ER 82; CR 6/29/92 14:23:37), an Amended Judgment was entered which limited American Homes' liability to $100,000 (ER 62).

Yamagishi and Hirai's Joint Notice of Appeal to the CNMI Supreme Court was filed on August 14, 1992 (ER 83; CR 8/14/92 14:16:46.) On September 22, 1992, the CNMI Supreme Court consolidated the appeals and set the briefing schedule.

C. DISPOSITION IN THE COURT BELOW

Defendants Hirai and Yamagishi appealed to the Supreme Court of the CNMI on several grounds including that the trial court committed error in failing to hear Hirai's defense regarding the settlement agreement (Hirai only) (ER 86-93), and that the defense of the written release applied to employees Hirai and Yamagishi as well as Macro and MOE.

Plaintiff filed a cross-appeal against Macro and MOE on the grounds that Macro and MOE were improperly dismissed on summary judgment prior to trial and requested that the Supreme Court impose the trial court's judgment upon Macro and MOE despite the fact that they were not present at the trial. Plaintiff also cross-appealed against American Home on the grounds that the insurance coverage limits were higher than the $100,000 figure adjudicated by the trial court. In his Opposition Brief filed in

response to plaintiffs' cross-appeal, Hirai pointed out that if the written release was not valid as to Macro and MOE and the order on summary judgment in their favor was vacated, then Macro and MOE would be entitled to a new trial which would entail a new trial as to all defendants to avoid inconsistent judgments.

Hearings were held on the related appeals on March 12, 1993 in the CNMI Supreme Court on the Island of Saipan. After several hours of argument, the CNMI Supreme Court requested further briefing on the effect of vacating the order granting summary judgment in favor of Macro and MOE; i.e., would this necessitate a new trial as to all parties? Those Supplemental Briefs were served and filed on April 8, 1993.

On October 28, 1993, the CNMI Supreme Court filed its Judgment and Opinion (ER 94).

With respect to the plaintiff-Hirai settlement agreement, the Supreme Court mistakenly stated that:

> Hearing the motion [to enforce a written settlement agreement] would have entailed continuing the trial to another day. A continuance would have required the shifting of the court's docket. (The Supreme Court's opinion, p. 35; ER 128.)

The record shows that this was not accurate. Hearing Hirai's complete defense on the basis of the settlement agreement, the most important aspect of this case to Hirai, would not have entailed continuing the trial to another day, or shifting the court's docket. Hirai asked "five minutes" of the court's time ER 66; RT 5/26/92 10:10-12). In the end, the Supreme Court of the CNMI ruled that a defendant could be denied his constitutional right to a hearing on a dispositive defense in the interest of expediency and docket control. It is notable that Hirai did not violate any local rule or order in raising his motion for summary judgment on the first day of trial. There was no law and motion cut-off. Several weeks before, the judge hearing law and motion matters had expressly stated that he wanted no more pretrial law and motion matters regarding this case. For this reason Hirai's motion was renewed in his pretrial brief and on the first day of trial (ER 66-67).

The Supreme Court held, inter alia:

5. The trial court did not err in denying Hirai's motion for summary judgment based on Hirai's settlement agreement with plaintiff. (Opinion and Judgment, p. 56, ER 149.)

The Supreme Court also vacated the Summary Judgment Order which dismissed Macro and MOE and remanded to the trial court with the limited purpose of:

1. Entering an amended judgment against Macro, Yamagishi, and Hirai, jointly and severally in the amount of $2,434,857.55 and

2. Determining whether MOE should be held jointly and severally liable to plaintiff based on the theory that MOE is the "alter ego" of Macro. If the trial court determines that MOE is the alter ego of Macro, it should also enter judgment against MOE, jointly and severally with the other defendants. (Ibid.)

On November 3, 1993, Hirai and the other defendants Petitioned for Re-Hearing pursuant to CNMI Rule of Appellate Procedure, Rule 40, on the grounds that the Supreme Court had overlooked or misapprehended particular points of law and fact in its written opinion filed on October 28, 1993. Hirai moved for re-hearing on the grounds that the Supreme Court had misapprehended the law when it determined that the trial court could deny Hirai a hearing on the settlement agreement defense in the interest of "docket control". The denial of a hearing was a violation of constitutional due process (ER 151-168).

Hirai also requested that the Supreme Court reconsider its imposition of joint and several liability upon Macro and MOE despite the fact that they were not present at the trial. Hirai asserted that a new trial for Macro and MOE required a new trial for Hirai and Yamagishi as well to avoid inconsistent judgments within the same action, and a violation of due process (ER 151- 168).

On November 23, 1993, the CNMI Supreme Court issued its order denying Hirai's Petition for Re-Hearing on the grounds that:

> Hirai's due process argument regarding the issue of the settlement agreement is being raised for the first time in this Petition for Re-Hearing. We shall not address this issue which was not raised below or earlier with us. (Order denying a Re-Hearing, p. 2; ER 170.)

The Supreme Court also rejected the argument that imposing the judgment on Macro without a trial was improper since Macro had pleaded that Yamagishi and Hirai were acting out of the scope of employment. The Supreme Court ruled that there was no evidence that Yamagishi and Hirai were acting outside the scope of employment. (Ibid.) However, scope of employment was never an issue at trial since Macro and MOE were not parties at trial.

D. STATEMENT OF FACTS

This is a wrongful death lawsuit filed by Ryoko Ito, as personal representative of the heirs of Akinobu Ito, who died in a September 24, 1988 scuba diving accident at a popular Saipan dive site known as the "Grotto" (ER 2-8).

Ito came to Saipan and to Macro on September 24, 1988, with the specific intention of diving at the Grotto, a well known scuba site in this part of the world (RT Vol. II, 123:4-6; RT Vol. II, 123:7-9 /5/).

On the afternoon of September 24, 1988, during a dive at the grotto led by diving instructor Yamagishi and assistant instructor Hirai, Ito drowned (RT Vol. IV, 348:15-17). He was later pronounced dead at the Commonwealth Health Center in Saipan.

V.
ARGUMENT

A. DENIAL OF HEARING ON MOTION TO ENFORCE A WRITTEN SETTLEMENT AGREEMENT - DUE PROCESS

1. The Settlement Agreement

During the course of this litigation, plaintiff and Hirai entered into a written settlement agreement (ER 31-45).

On June 21, 1991, plaintiff's counsel sent a written settlement offer to Hirai. The proposal was simple and short:

5/ There are no less than 18 scuba diving shops on Saipan. RT Vol. XII, 1031:8-18. Ito had his pick of all of them. He chose Macro.

> This will constitute plaintiff's offer to the defendant Nobuo Hirai to dismiss the case with prejudice against him under the following conditions:
>
> a) Hirai will meet with a [sic] expert of plaintiff's choosing to discuss the events surrounding this case and his employment in Saipan.
>
> b) Hirai agrees to testify at the trial. (ER 36).

Four days later, Hirai's counsel sent plaintiff's counsel a written acceptance, signed by both counsel and the Hirai, that was similarly simple and short:

> My client, NOBUO HIRAI, unconditionally accepts the offer to settle the case against him contained in your letter of June 21, 1991 under the terms specified therein. (ER 41).

The following day, plaintiff's counsel purported to orally revoke the offer, and a day later set a letter purporting to withdraw it (ER 44).

Despite their executed settlement agreement, plaintiff did not file a dismissal of Hirai. Accordingly, on September 12, 1991, Hirai filed a

Motion for Summary Judgment on the basis of the settlement agreement (ER 79; 9/12/91 11:45:48). No opposition was ever filed. However, the parties stipulated to a stay of the hearing until the matter was finally heard on the first day of trial on May 26, 1992 (ER 64-68). At that time, the court stated that this matter should have been taken up before trial and rather than entertain the Motion, the court denied the Motion (ER 64-68). Hirai is entitled to enforcement of the settlement agreement. In Del Rosario v. Camacho, Civ. Action No. 88-868, a slip opinion entered on February 7, 1990, the CNMI Supreme Court enforced John B. Camacho's oral agreement to settle a case after the plaintiff tried to repudiate the agreement, holding that "[o]nce a valid compromise and settlement is reached, a court's primary object is to effectuate the intentions of the party." citing 15 A. AMJUR 2d, Compromise and Settlement, §23. In the case at bench, the subject settlement agreement is not an oral agreement but a written settlement agrement.

Accordingly to the authors of 15 A. AMJUR 2d, §25 (Bancroft Whitney 1976):

> A valid compromise and settlement, is final, conclusive, and binding upon the parties and upon those who knowingly accept its benefits. It is as binding as any contract the parties could make, and as binding as if its terms were embodied in a judgment; and regardless of the actual merits of the antecedent claim may have been they will not afterward be inquired into and examined.

A settlement is simply a contract. Once plaintiff's offer was accepted, a contract was formed, and plaintiff lacked power to revoke the original offer:

> **Stipulations of settlement are favored by the courts and not lightly cast aside. . . . [O]nly where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation. Hallock v. State, 474 N.E.2d 1178, 1180 (N.Y. 1984).**

The written settlement agreement is, without doubt, a binding bilateral contract. Furthermore, Hirai performed under the contract. Specifically, he appeared and testified at trial, and made himself available to meet with plaintiff's expert (ER 82; CR 5/22/92 11:17:50). Accordingly, Hirai was and is entitled to dismissal based upon the irrefutable written settlement agreement which is fully enforceable and was properly the basis for dismissal at the time of trial.

2. The Right to a Hearing

This is not a case where the trial court simply decided that it would hear a motion at a time other than the first day of trial for the convenience of the court's docket. This is not that case. Instead, Hirai's strongest defense, the plaintiff-Hirai settlement agreement, was "denied" because the trial court chose not to hear it. The trial court ruled against enforcing the settlement agreement, without considering it, on the grounds that it thought the matter should have been addressed before trial, not at trial.

On the first day of trial, counsel for Hirai asked to be heard on the plaintiff-Hirai settlement agreement stating:

> If we can just have five minutes on that motion, because we thought the offer had been made and accepted. (ER 66; RT 5/26/92 10:10-12; emphasis added.)

The court repeatedly complained that a motion on the settlement agreement had not been heard before and that:

> Before you bring [this] up before the court, you have to notice this thing, and set it for hearing. (ER 66; RT 5/26/92 10:16-17.)

Counsel for Hirai responded with a reasonable explanation for the delay of the hearing in light of the fact that certain issues on summary judgment had been certified under Rule 54(b). The certification and stay was made after the motion for summary judgment on the settlement agreement was noticed but before the hearing. Thus, the action was stayed between the time Hirai's motion for summary judgment was originally filed and the date set for hearing. When the case was remanded back to the trial court after the Supreme Court dismissed the interlocutory appeal, the trial court instructed that it did not want to hear any more law and

motion matters before trial (ER 66-67; RT 5/26/92 10:18- 11: 12) /6/. Thus, Hirai waited until the pretrial briefs and the first day of trial to raise this issue.

Counsel for Hirai simply requested a hearing of this very important defense, if not on the first day of trial then at some time:

> If your Honor is willing to hear it today or at some point during the trial, we'd like to argue it. If your Honor would prefer that it be a matter of proof at sometime during the trial, then that would be acceptable to us, too. But there is a reason for why it hasn't been heard yet, and that was scheduling difficulties, and an agreement of counsel that the hearing wouldn't go forward until Mr. Hirai's deposition could be retaken. (Ibid; emphasis added.)

/6/ There was no law and motion cut-off, either by local rule or court order in this matter other than Judge Castro's instruction that the court did not want to hear any more law and motion matters prior to trial (ER 66-67).

The Court responded:

> We have about seven files this thick here, and these are matters that should have been taken up before trial. That's why I asked the parties, 'are you ready for trial?' Now, at this point, to entertain this motion, the court will not . . . will deny the motion. (ER 68; RT 5/26/92 12:17-20; emphasis added.)

The trial court did not simply put off a hearing on this issue to a more convenient time. It "denied" enforcing the settlement agreement on the grounds that hearing the matter at trial was inconvenient. The court

refused to hear Hirai's defense because it believed the matter should have been resolved in pretrial proceedings.

In the Supreme Court's opinion regarding the plaintiff-Hirai settlement agreement at pp. 34-35, the Supreme Court cited three cases for the proposition that the trial court possessed inherent power to police its docket and that the timing of trials and docket control are matters best left to the discretion of the trial court: Oliva v. Sullivan 958 F. 2d 272 (9th Cir. 1992); Edwards v. Cass County, Texas 919 F.2d 273 (5th Cir. 1990); Coursen v. A.H. Robbins Co., Inc. 764 F.2d 1329 (9th Cir. 1985) corrected by 773 F.2d 1049.

However, these cases in no way support the trial court's refusal to allow a hearing of Hirai's strongest defense, a written settlement agreement. In Oliva v. Sullivan, supra, the Ninth Circuit Court of Appeals held that the District Court abused its discretion when it put its inherent power to control its docket ahead of the rights of the parties to be heard on the merits. In that case, the local rules and the trial court's instructions provided that plaintiff should have filed a motion for summary judgment by August 6, 1987; plaintiff did not do so. Accordingly, the trial court dismissed the action. The Court of Appeal reversed, holding:

> . . . the public policy favoring disposition
> on the merits weighs against dismissal.
> (Oliva at p. 274.)

Oliva certainly does not stand for the proposition that parties such as Hirai may not have their defenses heard on the merits at the whim of the trial court.

In Edwards v. Cass County, Texas, supra, once again, the holding does not support the trial court's decision to deny a motion on the grounds that it refused to hear it. In Edwards, the trial court refused to hear an untimely motion for summary judgment. The defendant and moving party filed an interlocutory appeal. The Court of Appeal held, simply, that an interlocutory appeal was not proper, and that the defense should properly be raised as Hirai's defense was raised: at trial. The court held:

> **Having failed to take the appropriate measures**
> **to test the legal issue of immunity [the basis**
> **of the motion for summary judgment] prior to**
> **trial, these defendants must stand trial,**

> unless on remand the district court should elect to consider their motion for summary judgment and should determine that qualified immunity is present.
>
> Out of an abundance of caution, however, we note that the defendants still may assert qualified immunity at trial. (Edwards at p. 277; emphasis added.)

In the case at bench, the defense was presented at trial. This is not an interlocutory appeal. This is an appeal after a trial in which the trial court refused to hear petitioner Hirai's best defense.

The third case cited by the Supreme Court on this issue is Coursen v. A.H. Robbins, Co., Inc., 764 F.2d 1329 (9th Cir. 1985) corrected by 773 F.2d 1049. The appellant there contended that she was prejudiced because the trial court rescheduled her trial from February 14, 1984 to February 10, 1984. The court stated broadly that:

> The timing of trials and control of the docket are matters left to the discretion of the trial court. (Coursen at p. 1340.)

This case stands for the proposition that a trial court may control the timing of its trials and control the docket. It does not stand for the proposition that if a party presents a defense at an inconvenient time, the defense may simply be denied. Once again, the Coursen case, like Edwards, supra and Oliva, supra cited by the CNMI Supreme Court, do not support the trial court's summary denial of petitioner Hirai's best defense.

Due process of law under the 5th and 14th Amendments to the United States Constitution requires that parties have an opportunity to defend, enforce, and protect their rights. The guarantee of due process of law is one of the most important to be found in the Constitution, and it has been said that without such guarantee, the right of private property could not be said to exist in the sense in which it is known to our laws. (Ochoa v. Hernandez 230 U.S. 139 (1913).) Due process is not interested in mere technical formalism. It is, rather, the substance that is determinative of whether due process has been afforded. It is not a technical conception with a fixed content unrelated to time, place, and circumstances, but rather

expresses the requirement of fundamental fairness. (Lassiter v. Dept. of Social Services 452 U.S. 18 (1981).)

One of the essential elements of procedural due process is an opportunity for hearing. It is a cardinal principal of due process that no one may be bound by a judgment, either in respect to his or her person or property unless that person has had his or her day in court. In other words, a person may not be so bound until he or she has been afforded an opportunity to be heard. As the United States Supreme Court has stated:

> The right to a hearing . . . is one of the 'rudiments of fair play' . . . assured . . . by the 14th Amendment . . . . There can be no compromise on the footing of convenience or expediency. . . when that minimal requirement has been neglected or ignored. (Ohio Bell Telephone Co. v. Public Utilities Com. 301 U.S. 292, 304-305 (1937); emphasis added.)

In the case at bench, the trial court denied Hirai's right to a hearing on his strongest defense "on the footing of convenience or expediency". (Ohio Bell, supra.) It is difficult to imagine a clearer case of denial of due process and abuse of discretion.

3. The CNMI Supreme Court Committed Error in Refusing to Consider the Due Process Implications of Denial of a Hearing,

In its' Order Denying a Re-Hearing, the CNMI Supreme Court dismissed Hirai's due process rights in two sentences:

> Hirai's due process argument regarding the issue of the settlement agreement is being raised for the first time in his Petition for Re-Hearing. We shall not address this issue which was not raised below or earlier with us. (ER 170.)

This statement is incorrect. Hirai requested a hearing. That hearing was denied. Hirai appealed on the grounds that he had a right to a hearing during trial which was denied. Those are the facts.

The CNMI Supreme Court ruled that the trial court had a right to deny Hirai a hearing on his settlement agreement at trial in the interest of "docket control". Then the CNMI Supreme Court refused to even consider that this ruling amounted to a denial of the constitutional due process right to a hearing. This amounts to a violation of due process in its most basic form: fairness and substantial justice.

> At the trial court, as stated above, Hirai asked if we can just have five minutes on that motion. because we thought the offer had been made an accepted. . . .
>
> * * *
>
> If your Honor is willing to hear it today or at some point during the trial, we would like to argue it. If your Honor would prefer that it be a matter of proof at sometime during the trial, then that would be acceptable to us, too. (ER 66-67.)

Hirai clearly requested a hearing and the court clearly denied him that right. The issue of whether or not Hirai had the right to a hearing had not been waived; it had been requested and denied.

At the appeal stage, Hirai's Opening Brief before the CNMI Supreme Court argued that Hirai's settlement agreement should have been enforced. Hirai argued that the trial court committed error both procedurally in refusing to hear the issue at trial and substantively because the settlement agreement was valid.

> First, procedurally, a motion for summary judgment may be made at any time, including on the eve of, or even during trial. (Rule 56 Commonwealth Rules of Civil Procedure; Thrift v. Bell Lines, Inc., 296 F.Supp. 214, 217 (D.C.S.C. 1967); H.J. Hines Co. v. Beach-nut Lifesavers, Inc., 181 F.Supp. 452, 459 (D.C.N.Y. 1960). Hirai's written settlement agreement entitled him to dismissal. Whether plaintiff sought dismissal based upon that contract before or during trial has no bearing on Hirai's rights under the contract. He certainly did not waive his rights under the

> settlement contract by failing to enforce it before the trial. Obviously, if settlement agreement can only be enforced by pretrial motion, no settlements would ever be entered into during a trial. Accordingly, the basis for the [trial] court's refusal to entertain defendant's Motion is unsound. (Defendant's Opening Brief, pp. 44-45; ER 88-89.)

Clearly, this issue was raised in the initial stages of the appeal to the CNMI Supreme Court.

The CNMI's Supreme Court's conclusion that Hirai waived his due process right to a hearing or to raise the issue on appeal is incorrect and fundamentally unfair. "Court's indulge every presumption against the waiver or fundamental constitutional rights." (Johnson v. Zerbst, 304 U.S. 458 (1938); United States
v. Williamson, 803 F.2d 216, 219 (10th Cir. 1986).)

In sum, Hirai did raise this issue in the trial court and in the initial stages of the CNMI appeal, despite the CNMI Supreme Court's conclusory statement to the contrary. Furthermore, even if there were any question as to whether Hirai waived his due process rights, there is a strong presumption against such a wavier (Johnson, supra).

B. DEFENDANTS MACRO AND MOE, WHO WERE NOT PARTIES AT THE TIME OF THE TRIAL, ARE ENTITLED TO A NEW TRIAL ON THE MERITS, AND THEREFORE HIRAI IS ENTITLED TO A NEW TRIAL TO AVOID INCONSISTENT JUDGMENTS - DUE PROCESS

1. Macro and MOE are Entitled to a Trial on the Merits

In this case, Macro and MOE were dismissed by summary judgment and therefore were not present at trial. Nevertheless, the CNMI Supreme Court has ruled that Macro is bound by the judgment on the theory of "respondeat superior" and MOE may be bound by the judgement on the theory of "alter ego."

The CNMI Supreme Court stated:

> In particular, Macro's contention that its due

> process rights were violated is without merit. While it is true that a corporation is a distinct 'jural entity,' we disagree with the assertion that Macro is entitled to a full. trial on the issues on negligent conduct and liability before judgment may be entered against it, for here, it was being sued on respondeat's superior grounds. (order denying a re-hearing, pp. 1-2; ER 169-170.)

Defendant has found no cases where the doctrine of respondeat superior has been extended to impose a judgment upon a party without a hearing. Using this reasoning parties could simply prosecute an action against employees and then impose judgments thus obtained upon employers who are not parties to the trial, on a respondeat superior theory.

It is fundamental that a judgment does not apply to one who is not a party at trial. In her brief before the CNMI Supreme Court, plaintiff argued that the doctrines of collateral estoppel and privity should be applied to this novel situation.

Of course, the typical situation for application of these doctrines is a case in which plaintiff has obtained a judgment against a defendant, and then sues on that judgment in a second action against the defendant's insurance company who paid for and ran the defense in the first action. In those cases, the trial court has the discretion to apply the principals of collateral estoppel and privity so as to prevent re-litigation of the same issues.

In this case, however, plaintiffs are not attempting to sue defendant's insurance company on the judgment against its insured. Instead, plaintiffs are attempting to impose a judgment obtained against employees upon an employer who was not a party to the original action. Macro and MOE certainly cannot be said to have controlled this action or to have expected to be bound by this judgment as they had already been adjudicated to have no liability and were dismissed.

The question of whether the doctrines of privity and collateral estoppel apply to a case are questions of fact for the trial court (Areojet v. Askew (1975) 511 F.2d 710, 719). It was not appropriate for the CNMI Supreme Court to usurp the trial court's power to decide these issues of

fact and summarily deny Macro and MOE their right to a trial on the merits.

The CNMI Supreme Court does not indicate whether it adopted plaintiffs arguments regarding privity and collateral estoppel. However, if it did so, it did so in error. (1) Collateral estoppel is not applicable where a case involves only one action (Lytle v. Household Manufacturing (1990) 494 U.S. 545). The threat of multiple lawsuits, prevention of which is the purpose of collateral estoppel, is not a danger here. (2) Collateral estoppel should not be imposed offensively against one who is not a party to the original trial (Whittler v. Seibel (1982) 675 F.2d 245). (3) Privity in the collateral estoppel context can only be found where the party in privity reasonably expected to be bound by the earlier decision (Restatement of Judgments, 2d 39) and controlled the earlier lawsuit (Drier v. Tarpon 522 F. 2d 199 (5th Cir. 1975). In this case, on the contrary, Macro and MOE were specifically adjudicated to have no liability and they cannot be said to have controlled the earlier lawsuit from which they were dismissed; they were not present at trial.

2. Due Process Requires Avoidance of Inconsistent Judgments

It is fundamental that a judgment is not final with respect to any defendant if it is not final with respect to all defendants. Commonwealth Rule of Civil Procedure 54 (b) which is adopted from Rule 54(b) of the Federal Rules of Civil Procedure provides:

> . . . Any order or other form of decision, however it is designated, which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims or rights and liabilities of the parties.

Accordingly, a new trial against Macro and MOE necessitates a new trial against all defendants (except Hirai, if reversal should be granted Hirai on the grounds of the settlement agreement). This is the only way to prevent inconsistent findings of fact and conclusions of law in a single judgment. Since the judgment is joint and several, it cannot be based upon

inconsistent findings with respect to different parties within the same judgment.

The threat of inconsistent judgments within the same action not only violates the Rules of Civil Procedure, it also violates due process. The effect of inconsistent judgments is different treatment for different defendants within the same action. This would include the threat of different findings of fact with regard to the amount of damages, contributory negligence, etc., with respect to different defendants. Such a scenario is, of course, unheard of in the case law since it would be such a patent violation of due process.

C. THE CAPRICIOUS APPLICATION OF THE LAW

1. The Written Release and Express Assumption of Risk

The CNMI Supreme Court is bound by statute to follow the Restatement of Law of Torts and Contracts as expressed by the majority of the United States jurisdictions (7 CMC §3401). Nevertheless, the CNMI Supreme Court reversed the trial court's finding that a release and express assumption of risk operated to negate liability for negligence. This finding was contrary to the rule of the Restatement of Torts, 2d §496B as interpreted by the majority of jurisdictions. The CNMI Supreme Court's ruling was capricious and amounted to a denial of due process.

Hirai incorporates by reference herein the evidence, argument, and authority set forth in the Opening Brief to this Court of Yamagishi on the CNMI Supreme Court's Capricious failure to follow its own law.

2. The Standard of Care

The CNMI Supreme Court as well as the trial court rejected the use of a local standard of care and opted for a foreign standard of care. This ruling was contrary to the rules of Restatement of Torts, 2d §299A as expressed by a majority of jurisdictions. The courts of the CNMI are bound by statute to follow the law of the Restatement as expressed by a majority of the United States jurisdictions (7 CMC §3401). Nevertheless, the Supreme Courts of the CNMI has capriciously refused, in this case, to follow their own law with the resulting denial of due process to Hirai.

Hirai incorporates by reference the evidence, argument, and authority set forth in Yamagishi's Opening Brief to this Court regarding the standard of care.

VI.
CONCLUSION

For the foregoing reasons, defendant and appellant Nobuo Hirai respectfully requests that this court reverse the decision of the CNMI Supreme Court regarding the plaintiff-Hirai settlement agreement and enforce said settlement agreement and dismiss defendant and appellant Hirai from this action. Alternatively, defendant and appellant Hirai respectfully requests that this court remand this case to the CNMI Supreme Court with direction to enforce the settlement contract as a matter of law, or remand this case to the trial court for a full and fair hearing on defendant and appellant Hirai's motion to dismiss on the grounds of the settlement agreement.

Alternately, defendant and appellant Hirai requests that should this court rule that Macro and MOE are entitled to their own trial on the merits in this case, that it remand this action to the CNMI Supreme Court with instructions to vacate the judgment as against all defendants, and allow a new trial against all defendants and eliminate the threat of inconsistent judgments which would violate due process.

Alternatively, defendant and appellant Hirai request that this court reverse the decisions of the CNMI Supreme Court regarding the express release and assumption of risk, and the standard of care used by the trial court, on the grounds that those decisions represent a capricious and inequitable application of the law which constitutes a denial of due process.

DATED: March 28, 1994

Respectfully submitted,
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END O

APPENDIX P

U.S. Court of Appeals Docket No.: 94-15186
Lower Court Docket No.: CV-92-00020

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RYOKO ITO, as Personal Representative
of the Heirs of Akinobu Ito, Deceased

Plaintiff,

v.

MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI AND AMERICAN HOME ASSURANCE CO.

Defendants,

ON APPEAL FROM THE SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

OPENING BRIEF
OF
DEFENDANTS AND APPELLANTS, MACRO ENERGY, INC. AND SHIGEMI YAMAGISHI

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I.
STATEMENT OF JURISDICTION

The Superior Court had jurisdiction over this matter by virtue of 1 CMC §3202. The Supreme Court of the Commonwealth of the Northern

Mariana Islands (hereinafter, "Supreme Court of the CNMI") had jurisdiction over this matter by virtue of the final, amended judgment entered in the Superior Court against defendants Nobuo Hirai and Shigemi Yamagishi on August 10, 1992. The statutory basis for jurisdiction of the Supreme Court of the CNMI is provided by 1 CMC §3102(a).

This court has jurisdiction over this appeal by virtue of 48 U.S.C. §1694c(a) as this appeal involves the denial of the right to a full, fair and meaningful opportunity to be heard as guaranteed by the due process clause of the 5th and 14th Amendments of the United States Constitution which apply to the Supreme Court of the CNMI. (Covenant to establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ["the Covenant"], Article V, Section 501 (a).)/1/ The Covenant grants this court jurisdiction over decisions such as the one at bench involving the constitution of the United States. (The Covenant, Article III, Section 403)./2/

/1/ Section 501(a) reads as follows:

To the extent that they are not applicable of their own force the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana islands were one of the several states . . . . Amendments I through IX, inclusive; . . . Amendment xxv . . . .

/2/ The covenant, Article III, Section 403(a) provides in pertinent part:

For the first 15 years following the establishment of an appellate court of the Northern Mariana Islands the United States Court of Appeal for the judicial circuit which includes the Northern Mariana Islands will have jurisdiction of appeals from all final decisions of

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Appellants Macro Energy, Inc. and Shigemi Yamagishi filed their Notice of Appeal on December 22, 1993, twenty-nine (29) days after the entry of the November 23, 1993 Order Denying a Re-Hearing pursuant to Rule 40 of the Rules of Appellate Procedure of the Supreme Court of the CNMI.

This appeal lies from both the judgment and opinion of the Supreme Court of the CNMI entered on October 28, 1993 and the Order Denying Re-hearing of that judgment and opinion filed November 23, 1993. Circuit Rule 6-1(b)(i) provides that the timely petition for Re-Hearing under Rule 40 of the Rules of Appellate Procedures of the Supreme Court of the CNMI extends the time for filing the Notice of Appeal to thirty (30) days after the denial of the Petition for Re-Hearing. Therefore, this appeal is timely under Rule 4(a) of the Federal Rules of Appellate Procedure.

II.
STATEMENT OF ISSUES PRESENTED

1. Whether the Supreme Court of the CNMI impermissibly infringed upon Macro Energy's due process rights by refusing to afford it a full and fair opportunity to be heard before being bound by the trial court judgment where:

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the highest court of the Northern Mariana islands from which a decision could be had in all cases involving the Constitution, Treaties or laws of the United States, or any authority exercised thereunder . . . .

This rule was reaffirmed in the Commonwealth Judicial Reorganization Act of 1989, 1 CMC Div. III, Section 3103 which states in pertinent part:

The decision of the Supreme Court is final and may not be appealed to any other court, except as provided in Section 403(a) of the covenant.

(A) Macro Energy was neither a party nor virtually represented by any parties to the trial which resulted in judgment against its employees; and,

(B) Macro Energy did not otherwise control the litigation on behalf of the defendant employees.

2. Whether Macro Energy and Mr. Yamagishi were deprived of their due process right to a meaningful opportunity to be heard where the trial court and Supreme Court of the CNMI:

(A) Failed to apply controlling law in determining the legal effectiveness of the Express Release; and,

(B) Applied an incorrect standard in finding that Yamagishi negligently instructed Mr. Ito.

III.
STANDARD OF REVIEW

1. Whether it is unconstitutional to give preclusive effect to a prior judgment presents a mixed question of law and fact in which legal issues predominate. The question of the availability of the doctrine of res judicata is thus subject to de novo review. United States v. McConney, 728 F.2d 1195, 1202 (9th Cir. 1984) (en banc).

2. Whether Macro's constitutional rights have been violated by the court's failure to apply controlling law represents a question of law which is reviewable, de novo.

3. Whether Mr. Yamagishi's constitutional rights have been violated by the court's application of an improper standard of care presents a question of law which is reviewable, de novo. U.S. v. Singer Manufacturing Company, 374 U.S. 174 (1963).

IV.
STATEMENT OF THE CASE

A. Nature Of The Case.

This appeal has its genesis in a wrongful death lawsuit filed on September 14, 1989 by Ryoko Ito as personal representative of the heirs of Akinobu Ito who died in a September 24, 1988 scuba diving accident at the well-known Saipan dive site, the "Grotto".

B. Course of Proceeding.

On September 14, 1989, plaintiff Ryoko Ito filed a wrongful death action against defendants and appellants, Macro Energy, Inc. (hereinafter "Macro"), Nobuo Hirai (hereinafter "Hirai"), Shigemi Yamagishi (hereinafter "Yamagishi") and American Home Assurance Company (hereinafter "American Home"). Macro Energy is the scuba diving company that trained Ito in June of 1988 and to which he returned on September 24, 1988 to participate in the "Grotto" dive. In September of 1988, Yamagishi was president of Macro Energy, Inc. and its principal scuba instructor. Hirai served as an assistant instructor employed by Macro Energy. American Home is Macro Energy's and Yamagishi's insurance carrier. Finally, defendant Marianas ocean Enterprises (hereinafter "MOE") was alleged by plaintiff in the proceedings below to be the "alter ego" of Macro.

Plaintiff's Complaint alleged four causes of action: (1) negligent instruction by defendants in the June 1988 scuba diving course; (2) negligence of defendants on the day of Ito's death, September 24, 1988; (3) coverage under the American Home insurance policy (pursuant to the Commonwealth's "direct action" statute, or CMC §7502(e); and, (4) MOE's alter-ego relationship to Macro. (Excerpts of Record,/3/ pp. 2-8; "Complaint.")

On November 7, 1990, Macro Energy, Hirai, Yamagishi and American Home moved for summary judgment under Section 496B of the Restatement of Torts, 2d, based on the Express Release signed by Ito on the morning of his accident. (E.R., p. 233; C.R. 11/7/90 00:00:00./4/) On December 17, 1990, Judge Hefner granted summary judgment in favor of Macro Energy, Hirai, Yamagishi and American Home. (E.R., p. 12, "Summary Judgment of December 17, 1990.")

On December 27, 1990, Plaintiff moved for reconsideration of the order granting summary judgment, arguing that Ito's assumption of risk was not sufficiently "express" under Section 496B of the Restatement of Torts, 2d. (E.R. p. 234; C.R. 12/27/90 9:16:09; 12/28/90 11:50:26.) Oral arguments on plaintiff's Motion for Reconsideration were held on January 21, 1991. on January 28, 1991, the Court entered an "Amended Summary Judgment" and "Memorandum Decision" in which Judge Hefner held, upon further review of the release agreement, that although it effectively operated to release Macro Energy from liability, it did not release Yamagishi or Hirai, Macro Energy's agents and employees, because they were not specifically named in the release agreement. (E.R., pp. 27-30,

"Memorandum Decision of January 28, 1991.") Since MOE was alleged to be the alter ego of Macro Energy, MOE was dismissed.

/3/ (Hereinafter referred to as "E.R.")

/4/ "C.R." refers to the "Certificate Of Record By Clerk", filed in the Superior Court on October 9, 1992, and is followed by the filing date and time of the particular document referred to therein.

On or about February 17, 1992, the parties stipulated to a May 26, 1992 trial date. (E.R., p. 242; C.R. 2/19/92 11:32:58.)

On April 7, 1992, a hearing was scheduled on Defendants' motion for summary judgment based on the doctrine of implied assumption of risk and on their motion for reconsideration of Judge Hefner's amended summary judgment decision. Judge Castro declined to entertain the motions on their merits, asserting that they had been filed too close to trial, which was not set to commence for nearly two months. (E.R., p. 246; C.R. 10/09/92 07:50:29.) No motion cut off date had ever been set by the Court.

On June 22, 1992, following the two week trial of this matter, the Court entered judgment against Hirai, Yamagishi and American Home in the sum of approximately $2.4 million. (E.R., p. 47, "Judgement.") Following American Home's June 29, 1992 Motion to Alter or Amend the Judgment, an Amended Judgment was entered on August 10, 1992 which limited American Home's liability to $100,000. (E.R., pp. 63-64; "Amended Judgment.")

Yamagishi's and Hirai's Joint Notice of Appeal was filed on August 14, 1992 (E.R., p. 245; C.R. 8/14/92 14:16:46). Plaintiff's appeal was filed on August 21, 1992. (Id. E.R.; C.R. 8/21/92 07:59:26.) On September 22, 1992, the Supreme Court of the CNMI consolidated the appeals and set the briefing schedule.

C. Disposition of Case by the Supreme Court of the CNMI.

Following the completion of the briefing process, the Supreme Court held oral arguments on March 15, 1993. (E.R., p. 162; "Judgment and Opinion of the Supreme Court.") At the conclusion of argument, Justice de la Cruz posed a procedural question to the parties asking what would happen if the summary judgment in favor of Macro was reversed. In order to resolve this question, Justice de la Cruz agreed to allow all parties to submit supplemental briefs on this issue. Macro and Yamagishi filed their Joint Supplemental Brief on April 12, 1993 asserting that reversal of the trial court's summary judgment (which held Macro not liable due to the operation of the release) would necessitate a new trial on the merits. (E.R., pp. 153-160; "Supplemental Brief of Macro Energy and Yamagishi.")

On October 26, 1993 the Supreme Court of the CNMI rendered its judgment and opinion on the appeal and cross-appeals. The Supreme Court concluded that the exemption agreement signed by the decedent, Mr. Ito, was invalid and therefore failed to exonerate either the employees or Macro from liability. (E.R., pp. 184-186 "Judgment and Opinion of the Supreme Court" at pp. 23-25.) Thereafter, the Supreme Court matter was remanded to the trial court for the sole purpose of entering judgment against Macro, in addition to Yamagishi and Hirai, jointly and severally in the amount of $2,434,857.55. Id.

On the standard of care issue, the Supreme Court also affirmed the trial court's finding of negligence on the part of Hirai and Yamagishi based upon the International CMAS diving. (Id. at E.R., pp. 33-34.)

Yamagishi and Macro Energy, along with other parties filed a Petition for Re-hearing requesting that the Supreme Court reconsider its ruling on a number of grounds, including but not limited to contentions that: (1) due process required Macro be afforded an opportunity for a new and/or full trial on the merits before it could be bound by judgment to plaintiff Ryoko Ito; (2) the trial court failed to apply controlling legal principles in judging the effectiveness of the Express Release as a shield to liability; and (3) the trial court applied the incorrect standard in evaluating the sufficiency of Yamagishi's diving course and its certification of Ito. (E.R., pp. 219-221; "Petition for Rehearing.")

Thereafter, on or about November 23, 1993 the Supreme Court of the CNMI denied the Petitions for Re-Hearing submitted on behalf of Macro, Yamagishi and Hirai. (E.R., pp. 222-224, Order Denying Rehearing.) This denial was based upon the Court's finding that Macro's

due process rights would not be violated by enforcing the previous trial court judgment against it without first allowing Macro the opportunity to have a meaningful and full trial on the issues of negligent conduct since Macro had been sued on a theory of respondeat superior. Id. The only other ground asserted for the Supreme Court's denial was that they had not overlooked or misapprehended the pertinent points of law or fact in deciding the appeals and cross-appeals previously. Id.

D. Statement of Facts.

On June 3, 1988, Ito came to Saipan with Mr. Fujitomi to enroll in a scuba diving course provided by Macro Energy. (E.R., pp. 70-71; R.T./5/ Vol. I, 46-47.)/6/ At the beginning of

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/5/ "R.T." refers to the "Reporter's Transcript of Trial", filed with the Superior Court on October 9, 1992. The trial transcript consists of fourteen (14) volumes.

/6/ In March of 1988, Mr. Ito and Mr. Fujitomi had something called an "experience dive" in Japan. R.T. Volume 1, p. 91:22-26; p. 92:1-4.

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their course, Ito and Fujitomi were handed a document by Macro Energy dive personnel entitled "Statement of Understanding for Skin and Scuba Diving" which included an "outline of the dangers inherent in diving" in the Japanese language. (E.R, p. 75; R.T. Vol. I, 90:6-17.) This document warned that inappropriate use of diving equipment "can cause serious injury or sometimes death." (E.R., p. 76; R.T. Vol. I, 91:4-6.) Both Ito and Fujitomi signed this document, attesting that they were "fully informed of the basic risks and dangers of this sport"; both agreed to "accept this potential risk and take all the responsibilities for (their) activities." (E.R., p. 76; R.T. Vol. I, 91:7-21.)

During the "practical skills" portion of this course, Ito and Fujitomi were given instructions on the underwater hand signals necessary and scuba dive procedures including how to prepare and inspect scuba diving equipment; how to evaluate ocean conditions; how to perform a "buddy

check"; how to descend safely; how to "buddy breathe," etc. (E.R., pp. 78-87, 88; R.T. Vol. I, 93:1-102-.13 and 106:7-10.)

During the course, Ito and Fujitomi were also taught the hazards and dangers of diving, including, but not limited to the dangers of drowning; the hazards of running out of air underwater; the dangers of air embolisms; of having a lung burst from ascending without breathing; and the dangers of nitrogen narcosis. (E.R., pp. 91-92; R.T., Vol. II, 117:15-118:1-7 and 120:15-121:22.) Based on this instruction, Ito and Fujitomi understood that they could die if they did not learn the course material well and follow the prescribed guidelines. Id.

At the end of their course, Ito and Fujitomi received two "open water" scuba diving certification cards, or '"C-cards," one from "ADS Japan" and one from "CMAS," an international scuba diving organization./7/

After returning to Japan, Ito discussed the risks of scuba diving with his wife but also told her that "as long as [he] followed the instructions of the diving instructor or guide, that it wasn't really that dangerous a sport." (E.R., p. 128; R.T. Vol. X, 768:9-13.)

Ito and Fujitomi returned to Saipan and to Macro Energy on September 24, 1988, in order to participate in a dive at the Grotto, a well known scuba site located in the Northern Mariana Islands. When Ito arrived at the Macro Energy dive shop, he completed an application for the dive tour and thereby represented that he had participated in four prior scuba diving experiences. (E.R., p. 1; "Agreement for Exemption.") The agreement signed by Ito on the morning of September 24, 1988 was drafted by Macro Energy, in Japanese and translated, obviously without the assistance of someone with proficiency in the english language, and provides in relevant part as follows:

> "I SUBMITTED AN APPLICATION FOR PARTICIPATING IN THE DIVING TOUR AND OR TRAINING PROGRAM TO

/7/ Midori Horikawa, a licensed ADS and CMAS dive instructor who instructed Fujitomi and Ito, testified that she followed the ADS program whenever she trained a student in 1988. (E.R., pp. 97-100; R.T. Vol. III, 186:22; 189:i4.) When someone under Ms. Horikawa's charge successfully

completed the ADS curriculum requirements, they were "automatically entitled" to a CMAS open water C-card. Id.

> BE CONDUCTED BY YOUR AGENCY. I FULLY ACCEPT AND UNDERSTAND THAT SUCH A DIVING TOUR AND TRAINING INVOLVES BASIC RISK AND DANGER. IF WE FAIL TO ABIDE BY THE RULES AND REGULATIONS SET BY THE GUIDES AND INSTRUCTORS AND IF WE NEGLECT THE DIVING RULES, WE REALIZE THAT WE MAY RISK OUR LIVES. ALL THE RISKS THAT WE MAY HAVE DURING THE PERIOD OF STAY HERE BELONG TO EACH OF US PERSONALLY. IN CASE OF ACCIDENT, CAUSING INJURY OR DEATH TO MYSELF, I MYSELF, MY FAMILY, OR INHERITED ORGANIZATION AND OTHER RELATED PERSONNEL SHALL HAVE NO RIGHT TO PROTEST AGAINST NOR TO CLAIM FOR DAMAGES. WE HEREBY SWEAR TO ABIDE BY AND ACT AT THE RULES AND INSTRUCTIONS SET BY THE GUIDES AND INSTRUCTORS. ALSO I AM FULLY A GROWN UP AT LAW AND I ACKNOWLEDGE THE FACT THAT I AM FULLY QUALIFIED TO SIGN THIS AGREEMENT, TO VERIFY THE EXEMPTIONS FROM ALL THE CLAIMS FOR DAMAGES. ALL THE ITEMS IN THIS APPLICATION ARE TO BE DECIDED BY THE AGREEMENT, AND I PERSONALLY SIGN THIS DOCUMENT AT MY OWN WILL RATHER THAN SOMEONE DIRECTING ME TO SIGN THIS PAPER." Note that Release contained both Japanese and English translation of Japanese version.

Id.

Macro Energy employee, Kaori Yoshimura, explained the effect of this release agreement to Ito, particularly that he was assuming all the risks of diving if he signed the document. (E.R., p. 130; R.T. Vol. XI, 829:2-6:22-24.) After reading the Release, Ito expressly stated he understood its contents and then signed the Release. Id.

Yoshimura informed Ito along with the other divers that the dive tour was going to the Grotto that morning. (E.R. p. 131; R.T. Vol. XI, 830:9-14.) Yamagishi held several meetings concerning the dive with the fifteen divers at the dive shop, in the parking lot above the Grotto, and at the bottom of the stairs at the Grotto pool itself. (E.R., pp. 103-104; R.T. Vol. IV, 285:13-286:5.)

As the dive commenced, Yamagishi led the divers through the center passage into the open ocean. (E.R., pp. 106-107; R.T. Vol. IV, 292-293.) Several "air checks" were made during the course of the dive, which was a procedure whereby Yamagishi would have each of the divers signal their remaining air to him. Id. Meanwhile, Hirai stayed behind for a few minutes to help a diver who had trouble clearing her ears, and then joined the rest of the divers midway through the dive proceeding to a point where he could observe the divers. Shortly thereafter, Hirai observed one of the divers, later identified as Fujitomi, take his regulator in and out of his mouth and attempt to breath from his power inflator; the diver looked like he was beginning to panic. (E.R., p. 113; R.T. Vol. IV, 333:10-20.)

Hirai quickly donated his own primary regulator to Fujitomi and resumed breathing from his Air II. (E.R., p. 114; R.T. Vol. IV, 335:1-6; Vol. XI, 856:2-14.) Fujitomi began kicking with his fins, trying to get to the surface while Hirai held on to him and gestured with his thumb to stay down. At that point, Ito began to swim towards Hirai and Fujitomi, whereupon Hirai signaled for Ito to stay down as well. (E.R., pp. 134-135; R.T. Vol. XI, 856:12-20-857:2-4.) Since it was impossible for Hirai to hold Fujitomi down while Fujitomi was kicking his fins, the pair slowly surfaced. Ito was about two to three meters away looking directly at Hirai when Hirai signaled for him to stay down. (E.R., p. 135; R.T. Vol. XI, p. 857:5-8, 12-24). In spite of Hirai's clear instruction, Ito surfaced outside the Grotto with Hirai and Fujitomi. After a brief interval on the surface, Hirai told the divers to descend. When Hirai and Fujitomi reached the bottom near the center entrance to the Grotto, they looked up to see Ito still on the surface. (E.R., pp. 137 and 141; R.T. Vol. XI, 860:1-19; 868:2-6.) They waited for a minute or a minute and a half for Ito to join them on the bottom, where Hirai had the two divers briefly collected themselves. As they did so, Hirai checked Ito's air; he had about 400 pounds of pressure per square inch. (E.R., p. 116; R.T. Vol. IV, 344:13-18.) At this point, Ito and Fujitomi were acting normally, so Hirai gave the signal to proceed inside the opening. (E.R., p. 141; R.T. Vol. XI, 868:19-26.)

As the divers proceeded through the center opening, Hirai towed Fujitomi, who was breathing from Hirai's primary regulator. (E.R., pp. 115-116, 118; R.T. Vol. IV, 343:3-5; R.T. Vol. IV, 344:9-12; R.T. Vol. IV, 346:6-10.) When the divers neared the "Grotto," Ito gave a "no air" signal to Hirai, who immediately donated the octopus he was using to Ito, while Hirai proceeded to begin breathing from his third air source, his "Air II". (E.R., pp. 118-119; R.T. Vol. IV, 346:11-16; 347:3-4.)

When Hirai and Fujitomi surfaced at the Grotto pool, Ito had disappeared. (E.R., p. 119; R.T. Vol. IV, 347:6.) After a few seconds, Fujitomi shouted "over there", and Hirai promptly dove to a depth of 12 feet to assist Ito. Mouth-to-mouth resuscitation was commenced immediately upon surfacing, (E.R., p. 120; R.T. Vol. IV, 348:5-17), but to no avail; Ito was later pronounced dead at the Commonwealth Health Center. The pathologist concluded that he had drowned.

Two days later, Fujitomi went back and dived the Grotto again. (E.R., p. 84; R.T. Vol. I, 99:2-4.)

V.
ARGUMENT

I. THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENT PROHIBIT APPELLANT MACRO FROM BEING BOUND BY THE TRIAL COURT JUDGMENT.

Due process of law as established by the Fifth and Fourteenth Amendments to the United States Constitution requires that parties have an opportunity to defend, enforce and protect their rights. The guarantee of due process of law is one of the most important to be found in the federal constitution. It has been described as the very essence of a scheme of justice and without it the right to private property could not be said to exist. Ochoa v. Hernandez v Morales, 230 U.S. 139 (1913).

It is a fundamental principle of due process that no one may be bound by a judgment, either in respect to his or her person or property unless that person has had their day in court. "The right to a hearing ... is one of the, rudiments of fair play .... assured by the Fourteenth Amendment,....There can be no compromise on the footing of convenience or expediency when that minimal requirement has been neglected or

ignored." Ohio Bell Telephone Co. v. Public Utilities Co., 301 U.S. 292, 304 (1937).

The application of the prohibition against any state or commonwealth's deprivation of life, liberty or property without due process of law depends upon a two-part analysis. First, whether the asserted individual interests are encompassed within the Fourteenth Amendment protection of life, liberty or property; and, second, if protected interests are implicated, the Court must then decide what procedures constitute "due process of law". Ingraham v. Wright, 430 U.S. 651 (1977).

The decision of the Supreme Court of the CNMI from which this Appeal lies clearly implicates protected property rights as the Court ordered that the money judgment previously rendered in excess of $2.4 million be entered against Macro, jointly and severally with the other named defendants. (E.R., pp. 161-218; Judgment and Opinion of the Supreme Court of October 26, 1993.)

Accordingly, the threshold issue here is whether due process permits the Supreme Court of the CNMI to give preclusive effect to a judgment Macro which was not a party to the trial where the judgment was rendered. Macro contends that it must be afforded a full and fair opportunity to be heard and to defend itself--as guaranteed by the due process clause of the Fifth and Fourteenth Amendments--before it can be bound by any such adverse judgment.

Speaking to this issue, the United States Supreme Court has historically observed that the concept of preclusion extends no further than to parties to the prior litigation. Hansberry v. Lee, 311 U.S. 32, 40 (1940). "[J]udicial acts of enforcing [the prior judgment] against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require." Id. at 41. This premise was reiterated in Blounder-Tongue Laboratories v. University of Illinois Foundation 402 U.S. 313, 329 (1971) where the Supreme Court opined:

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> "Some litigants - those who have never appeared in a prior action - may not be collaterally estopped without litigating the issue. They have never had a chance to

> present their evidence and arguments on the claim. Thus, due process prohibits estopping them despite one or more existing adjudications of the identical issue which stands squarely against their position."

See, also, Parker v. Williams, 862 F.2d 1471 (11th Cir. 1989); Parklane-Hosiery Company v. Shore 439 U.S. 322, 327 fn. 7 (1979); Trujillo v. County of Santa Clara, 775 F.2d 1359 (9th Cir. 1985).

In the current action, the trial court granted summary judgment in favor of Marco on December 17, 1990 based on a finding that the express release signed by decedent Ito shielded Macro from any and all liability on plaintiff's wrongful death claims./8/ As a result, Macro was dismissed from the action and the two-week trial commenced on May 26, 1992 against Macro's employees, Nobuo Hirai and Shigemi Yamagishi, and American Home. On June 5, 1992, the trial court action concluded with a judgment against the employees and the insurer, alone, in the sum of approximately $2.4 million. (E.R., p. 47;"Judgment" of June 22, 1992.)

The foregoing events clearly demonstrate that the Supreme Court impermissibly violated Macro's due process rights by giving preclusive effect to the June 5, 1992 judgment as

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/8/ (E.R., p. ; "Summary Judgment" of Dec. 17, 1990) The trial court also affirmed the summary judgment in favor of Macro in its amended summary judgment opinion of January 28, 1991.

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against Macro after reversing the trial court's previous summary judgment order in its favor. Due process guarantees of the Fifth and Fourteenth Amendments mandate that Macro be granted a new trial on the merits so that it may have a full and fair opportunity to defend itself before it may be liable on plaintiff's wrongful death claims.

A. Macro's Interests were not "Vicariously or Virtually Represented" by the Parties in the Underlying Action.

Appellant Macro acknowledges that federal courts have relied upon the doctrine of "virtual representation," in very limited circumstances, to bind a non-party to a prior judgment. (See, e.g., United States v. ITT Rayanier, Inc., 627 F.2d 996, 1003 (9th Cir. 1980).) Under the doctrine of virtual representation", "a person technically not a party to the prior action may be bound by the prior decision only 'if his interests are so similar to a party's that the party was his "virtual representative" in the prior action.' [Citation omitted.]" A&A Concrete v. White Mountain Apache Tribe, 781 P.2d 1411, 1417 (9th Cir. 1986). The due process clause limits this doctrine by permitting a judgment to bind a non-party only if this relationship is sufficiently close. Hansberry, 311 U.S. 42-44.

Recognizing the limits on giving binding effect on litigation conducted through a representative, courts have held that even though a non-party appeared to be "virtually represented" in an action, the non-party could not be bound by the resulting judgment where there is a substantial divergence of interests between them. In Hansberry v. Lee, 311 U.S. at 42-44, the Supreme Court held that persons vicariously represented in a class action could not be bound by a judgment where the representative parties had interests that impermissibly conflicted with those of the person or entity represented. To do so would deprive the nonparty of due process of law as guaranteed by the Fifth and Fourteenth Amendments. Id.

Similarly, in United States v. Truckee-Carson, Etc., 649 F.2d 1286, 1303 (9th Cir. 1981) this circuit held that where the interests of the representative of the non-party are antagonistic to or are not sufficiently close with those of the non-party, "privity" is lacking and preclusion in that case would necessarily deny due process to the non-party. More specifically, the court observed:

> "[R]epresentation of a non-party will not always result in the same preclusive effect that bind parties" particularly where there is a divergence of interests between the non-party and the representative such that the representative "could not fairly represent [the non-party] with respect to matters as to which the judgment is subsequently involved ...."

Id., citing Restatement Second of Judgments,§86(d); A&A Concrete 781 F.2d at 1417-1418.

In the current action, the Supreme Court of the CNMI gave preclusive effect to the trial court judgment rendered against Hirai and Yamagishi alone, based on its erroneous finding that Macro's interests were "vicariously" represented at trial against these individual parties. (E.R., p. 217, "Judgment and Opinion of Supreme Court", p. 56 and E.R., p. 222-223, Order denying petition for rehearing.)

The only evidence the Supreme Court cited to support the finding that Macro was not entitled to a new trial was the fact that liability against Macro was asserted on a theory of respondeat superior. (Id. at E.R., 185, 223.) The court, implicitly recognized, however, a divergence in the interests between Macro and its employees, Hirai and Yamagishi, because Macro could defeat liability under this theory by pleading and proving that these defendants acted outside the course and scope of their employment.

Further, the Supreme Court chose to ignore this conflict between the interests of Macro and its employees for two reasons. First, the Supreme Court stated that Macro's Answer to the Complaint filed jointly with its employees, failed to allege as an affirmative defense that the employees acted beyond the course and scope of employment. (E.R., p. 185, 223, "Judgment and Opinion of the Supreme Court" and "Order denying rehearing".) To assert such a defense within the parties joint answer would, however, unfairly impinge on the other defendant employees' interests. The only way Macro could properly raise such a defense would be through the use of separate counsel.

Secondly, although the Supreme Court of the CNMI agreed that Macro could file an amended answer to raise the above-noted affirmative defense, it still refused to acknowledge the conflicts of interest presented by the same. This continued refusal was based on the fact that Macro's appellate briefs and/or petition for rehearing failed to provide factual support for the theory that these employees acted beyond the course and scope of their employment in allegedly causing Mr. Ito's death. (Id. at E.R., p. 185 and 223.)

In so noting, the Court ignored the fact that such contentions were not raised at the trial level, and thus could not properly be asserted in the petition for rehearing or in Macro's appellate briefs. Moreover, the court expressly relied upon this procedural limitation in denying Hirai's petition,

stating that it was improperly based upon "new issues" not raised below or earlier on appeal to the Supreme Court. (E.R., p. 223; Order Denying Petition for Rehearing.)

The above-referenced antagonism between Macro's interests and those of Hirai and Yamagishi clearly establishes that Macro was not "virtually represented" by Hirai and Yamagishi in the underlying action. Accordingly, the Supreme Court's ruling enforcing the trial court judgment against Macro following the reversal of the trial court's summary judgment in its favor, impermissibly denied Macro's due process rights to a full and fair opportunity to litigate their claims. Therefore, concepts of due process and fairness dictate that a new trial should be ordered to allow Macro the opportunity to fully and fairly litigate, defend and oppose the claims asserted against it.

B. Macro Did Not Have Sufficient Control Over Or Interest In The Litigation Of The Underlying Action.

Macro contends that because it was neither a party to the action at the time of trial, nor was it "virtually represented" by or otherwise in privity with the parties thereto, it cannot be bound by the trial court's judgment absent a showing that it controlled the defense of Hirai and Ito during trial. Macro acknowledges that a non-party may be in "privity" with a party for the purposes of res judicata or collateral estoppel where the non-party actually controlled the prior litigation. Hewell Hydrocarbons, Inc. v. Adams, 897 F.2d 183, 188 (5th Cir. 1990).

This exception to basic due process requirements is not without limitations. In fact, as one court explained: Non- parties to a prior action have had a full and fair opportunity to litigate or defend a claim within the meaning of the Fifth and Fourteenth Amendments only if they "assume control over the litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved." In Re Behdectic Products Liability Litigation, 732 F.Supp. 744 (E.D. Mich. 1990). In that situation, the non-party may be bound by any resulting judgment. Id.

Macro contends that it cannot be bound by the trial court's resulting judgment as it neither controlled nor had an interest in the litigation after the trial court granted a motion for summary judgment in its favor. More specifically, if Macro had a significant interest in the outcome of the trial, it would have asserted a defense to plaintiff's "respondeat superior" claims

based on allegations that Hirai and Yamagishi acted outside the course and scope of employment in allegedly causing the decedent's fatal injuries. Further, while Macro did initially share legal representation with the defendant employees, Federal courts have held that the commonality of attorneys and pleadings, without more, does not allow a prior judgment to have preclusive effect on non-parties where the party and non-party did not share the same interests in the lawsuit or bear the requisite legal relationship. Freeman, 771 F.2d 860, 864-65 (1985).

As noted above, the Supreme Court of the CNMI, in a broad sweeping gesture, reversed the trial court's summary judgment order in favor of Macro and then concluded that Macro should be bound by the trial court judgment rendered against its employees alone. Such judicial actions clearly offend basic principles of due process of law which, as Justice Oliver Wendell Homes stated, undoubtedly "embrace the fundamental conception of a fair trial, with [an] opportunity to be heard." Frank v. Mangin (1915) 237 U.S. 304, 347. Therefore, in order to satisfy due process requirements, Macro must be granted a new trial on the merits where it will be afforded the opportunity to defend itself against the claims of plaintiff and appellant Ryoko Ito.

VI.
APPELLANTS MACRO ENERGY AND YAMAGISHI WERE DEPRIVED OF THEIR CONSTITUTIONAL RIGHT TO A MEANINGFUL OPPORTUNITY TO BE HEARD.

One of the fundamental requirements of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution is the opportunity of a litigant to be heard at a meaningful time and in a meaningful manner. Matthews v. Eldridge, 424 U.S. 319 (1976); Fuentes v. Shevin, 407 U.S. 67 (1972); Parratt v. Taylor 68 L.Ed. 420 (1981). A meaningful hearing for litigants is a basic and essential part the Constitutional system. Gilday v. Board of Elections 472 F.2d 214 (1972). Further, since the essential reason for the due process requirement of a hearing prior to the deprivation of property is to prevent unfair and mistaken deprivations of property, such a hearing must provide a real test and prove meaningful. Fuentes
v. Shevin 407 U.S. 67 (1972). A "full and fair hearing" is one in which ample opportunity is afforded to all parties to assert, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. New England Div. Case, 261 U.S. 184.

A. THE SUPREME COURT FAILED TO APPLY CONTROLLING LAW IN
DETERMINING WHETHER THE RELEASE EFFECTIVELY SHIELDED
MACRO AND/OR YAMAGISHI FROM LIABILITY.

Macro and Yamagishi contend that the Supreme Court's failure to evaluate the legal effectiveness of the subject release under the prevailing law of the Commonwealth deprived them of their constitutional right to a meaningful hearing. Pursuant to 7 CMC §3401 the Commonwealth has adopted the legal principles codified in the Restatement as its governing law.' Thus, the Restatement of Torts 2d §496B should have controlled the court's determination of the scope and validity of the release signed by Ito prior to his fatal diving accident.

The Restatement of Torts 2d Section 496B applicable to

/9/ Section 3401 provides:

> In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary...

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express release agreements provides that "A plaintiff who, by contract or otherwise, expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy." (Emphasis added.)

The majority of jurisdiction interpreting section 496B have held that to be effective, a release need not contain specific reference that the

releasor is to assume the risk of harm arising from the releasee's negligence or reckless conduct. See, e.g. Heil Valley Ranch Corp. v. Simpkin, 74 P.2d 781 (Colo. 1989); Schutkowski v. Carey, 725 P.2d 1057 (Wyo. 1986); Trainor
v. Aztlan Cycle Club, Inc., 147 Wis. 2d 107, 432 N.W.2d 626 (1988); Hewitt v. Miller, 11 Wash.App. 72, 521 P.2d 244 (1974); Sanez v. White Water Voyages, Inc., 266 Cal.App.3d 758 [276 Cal.Rptr. 672] (1990).

These courts recognize that the primary duty of the court is to ascertain the party's intent in executing the agreement and employ common sense in its interpretation. For instance, in affirming the trial court's judgment in favor of the defendants (based upon an express release) one court observed:

> [T]he...language contained in the release here in question reveals that it clearly is applicable to the accident which apparently resulted in (decedent's) death. The failure of a diver to surface obviously is an inherent danger of scuba diving. By signing the release, he would acknowledge the possibility of his own death from the "inherent dangers" of scuba diving and agreed that the respondents are not to be deemed the guardians of his safety." Id. at 248.
> In the instant case, the release executed by Ito

shortly before his fatal scuba diving accident reads as follows:

> ... I fully accept and understand that such a diving tour and training involve basic risk and danger. If we fail to abide by the rules and regulations set by the guides and instructors and if we neglect the diving rules, we realize that we may risk our lives. All the risks that we may have during the period of stay here belong to each of us personally. In case of accident, causing injury or death to myself, my family or inherited organization and other related personnel shall have no right to protest against nor to claim for damages. We hereby

swear to abide by and act as the rules and instructions set by the guides and instructors. (Emphasis Added).

The language of this release reveals that the decedent did intend to release Macro Energy, Inc. and all of its agents and employees from any and all claims for damages arising out of his participation in the diving tour and training program, and eventual dive. By signing the Release, Ito accepted all risks and dangers of scuba diving which include drowning and instructor negligence/10/ as well as the risks of failing to abide by the rules and regulations set by the instructor as noted above.

Contrary to the clear meaning of this release and Section 496B of the Restatement of torts, the Supreme Court found that the release only operated to relieve the Macro and/or Yamagishi from liability if Ito's death was caused by Ito's own failure to abide by the rules and regulations set by the guides and the instructors in his own neglect of the diving rules./11/ (E.R. p. 182-183;"Judgment and Opinion of the Supreme Court".) The Supreme Court impermissibly deprived appellants of their constitutional right to a meaningful opportunity to be heard by relying on this strict interpretation to find that the Release did not effectively relieve either Macro or its employees, Yamagishi and Hirai, from liability for Ito's death caused by the inherent risks of scuba diving.

In applying this strained interpretation of the release to affirm the trial court's finding that the release did not operate to relieve Mr. Yamagishi from liability, the court also failed to apply the governing provisions of the Restatement on Agency. In particular, Section 347 of the Restatement,2d of Agency provides in pertinent part:

/10/As the Court observed in Madison v. Superior Court, 203 Cal. App. 3d 589, 250 Cal.Rptr. 299 (1988), instructor negligence "heads the list" of the reasonably foreseeable risks of scuba diving.

/11/This conclusion of the Supreme Court is based on a requirement read into the provisions of Section 496 (b) of the Restatement by a minority of jurisdictions that the release specifically enumerate every risk to be assumed by the Releasor, including the obvious risk of the Releasee's negligence.

> "Where, because of his relation to a third party, a master owes no duty, or a diminished duty, of care, a servant in the performance of his master's work owes no greater duty, unless there has been reliance by the master or by a third person under a greater undertaking by the servant."

"An employer may, by contract, relieve himself from liability for ordinary negligence to purchasers, bailors, and beneficiaries. In all such cases, a servant or other agent is not required to meet a higher standard than that required of the principal." Restatement of Agency, 2d, Section 347, comment b; see also, Restatement of Agency, 2d, Section 350, comment d.

Authorities interpreting this section have observed that where a valid agreement is entered into between an employer and a third person, exculpating the former from liability to the latter for ordinary negligence, an employee is ordinarily entitled to the same exculpation as his employer, even though he is not expressly named as a beneficiary of such exculpation "....[particularly]] where no rights are expressly reserved to proceed against the servant or employee." Mayfair Fabrics v. Henley, 101 N.J. 363, 244 A.2d 344, 347-348 (1968); Madison, 203 Cal.App. 3d at 593 [finding that since the scuba instructor was an agent and employee of YMCA, "he is entitled to the legal protection of the release and waiver (signed by the deceased scuba diving student) to the same extent as YMCA even though not specifically named therein."]

As noted above, the clear intent of the parties to the release executed by Ito was to bar all claims resulting from a scuba diving accident. By interpreting the Release to provide no protection to Macro or its employees, the Supreme Court rendered the release essentially meaningless and reached a result which contradicts the controlling provisions of the above-noted Restatement sections as well as the intent of the parties. Therefore, the Supreme Court deprived Appellants of their constitutionally guaranteed meaningful opportunity to be heard before being deprived of the protected property rights.

Finally, it should be emphasized that Section 496B of the Restatement embodies the traditional concept of personal responsibility which is based upon two central premises. The first is that people have a primary, paramount and non-delegable responsibility for their own safety and thus must accept the consequences of risks they knowingly choose to encounter. The second and interrelated premise is that individuals in an implied or express contractual relationship with another should be entitled to rely upon the first premise to prevent liability from attaching when the other individual has chosen to subject himself to potential dangers inherent in certain activities. When an individual intentionally, knowingly and reasonably chooses to encounter a risk, as he does when he participates in a sport he knows to be dangerous, the law will not allow him to seek recovery from others if he later sustains injury.

If that individual has manifested his intent and knowledge in writing, or by his words, the law will hold that he has expressly assumed the risk of injury; if his intent and knowledge is evident from his conduct, the law will say that he has impliedly assumed that risk. Moreover, when someone intentionally encounters a known risk, but does so in an unreasonable way, the law will hold him contributorily negligent and thereby bar any recovery from others whose negligence has combined with his own to cause injury.

The Supreme Court's decision here contravenes the principals set forth above by presuming that Akinobu Ito, a 46-year-old college-educated senior manager with Daihatsu Heavy Industries of Japan, was incapable of making choices, incapable of watching out for his own safety, and incapable of voluntarily encountering known and obvious dangers. This premise was improperly relied upon to exempt Ito from the legal disabilities which attach to an intentional but unreasonable decision to encounter a known danger which resulted in his death.

B. THE COURT DEPRIVED YAMAGISHI OF A MEANINGFUL OPPORTUNITY TO BE HEARD BY EVALUATING ITS CONDUCT BASED UPON AN IMPROPER STANDARD.

Appellant Yamagishi contends that the court failed to afford him a meaningful opportunity to adequately contest the claims asserted by plaintiffs by proving that the diving course he taught to meet the requisite diving standards of care. More specifically, Yamagishi was deprived his right to due process of law due to the court's application of the

international as opposed to local standard in upholding the trial court judgment against Yamagishi.

The Restatement of Torts 2d, Section 299A provides in pertinent part:

> "Unless he represents that he has greater or less skill or knowledge one who undertakes to render services in the practice of a professional trade is required to exercise his skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities. (Emphasis added).

While the Supreme Court acknowledged that the Restatement requires defendant Yamagishi to be held to the same standard of care applicable to the community in which he taught the diving course, Saipan, the Court nonetheless evaluated Yamagishi's conduct under a higher international standard of care. At trial, the parties offered two different standards of diving certification for the court to use in evaluating Yamagishi and Hirai's conduct. Such standards included the CMAS standard adhered to by a number of countries outside of Saipan and the ADS standard which diving courses throughout Saipan and Japan used in certifying their student divers.

The Supreme Court's opinion that Yamagishi should be held to a higher standard of care was because he "purported to certify Mr. Ito under the CMAS standard." (E.R., p. 192, "Judgment and Opinion of the Supreme Court".) In reaching this conclusion, the Supreme Court completely misapprehended the relevant evidence proffered at trial. More specifically, former Macro Energy employee, Midori Horikawa, a licensed ADS and CMAS dive instructor and former employee of Macro Energy and identified by Fujitomi as one of Ito's course instructors, testified that she followed the ADS program when she trained her students in 1988. (See E.R., p. 97-100;R.T. Vol. III, 186:22-24; 187:14-15; 188:10-15: 189:11-14). Further, Ms. Horikawa testified that when someone under her charge successfully completed the ADS curriculum requirements of three hours in the water, they were "automatically entitled" to a "CMAS" open water dive C-card. (Id. at E.R., p. 101; R.T. Vol. III, 189:18-19; 190:4-26.) Ms. Horikawa's statements were also supported by the testimony of Yamagishi. (Id. at E.R., p. 101; R.T. Vol. III, 226:22-24).

Plaintiff's own expert, Mr. Hugh Morrison, testified that the ADS standards are unique to Japan, the Northern Marianas and a handful of other locations. Mr. Morrison stated that although the ADS standard is based in part on some CMAS standards and ADS dive courses issue a CMAS 1 Star Diver card to its students; under the ADS standard, issuance of a CMAS 1 Star Diver card is warranted upon completion of less instruction than that provided under the "pure" CMAS standards. Further, in an ADS jurisdiction a 1 Star Diver card entitles the recipient to be eligible for open water dives although use of that same card in a CMAS jurisdiction does not. (See E.R., pp. 97-100; R.T. Vol. III, 1867:22-189:19.) Accordingly, it appears that both the trial court and Supreme Court of the CNMI experienced confusion with the ADS standard which, although based upon principles applicable to the CMAS standard, is separate and distinct.

In addition, although plaintiff's expert testified that CMAS set the minimum standards elsewhere in the world for determining the competence of divers, he freely conceded that in Saipan and in Japan, however, ADS provided the applicable standard. Accordingly, such evidence demonstrates that appellant Yamagishi was not attempting to use a lower standard than that used by him to certify decedent Ito. Rather, he was merely attempting to be judged by the same local standard adhered to by dive shops and dive instructors throughout Saipan as well as Japan: the ADS standard.

Therefore, the Supreme Court violated Yamagishi's due process right by improperly relying upon the international and more stringent CMAS standard rather than the Saipan based ADS standard in affirming the trial court's finding of negligence. Thus, due process requires that a new trial should be granted to afford Yamagishi his Constitutionally guaranteed right to a meaningful opportunity to be heard on these issues.

VI.
CONCLUSION

Based upon the foregoing authorities, appellants Macro Energy and Shigemi Yamagishi respectfully request that this court grant their request for a new trial so that they may be afforded their constitutionally guaranteed right, which they were deprived of by the courts below, for a full and fair hearing on the substantive isssues set forth more fully above.

Respectfully submitted this 25th day of March, 1994.

LYNBERG & WATKINS
A Professional Corporation
By:
CHARLES A. LYNBERG
RANDALL J. PETERS

END P

APPENDIX Q

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RYOKO ITO, as Personal Representative or the heirs of AKINOBU ITO, Deceased, Plaintiff-Appellee, vs. MACRO ENERGY, INC., et al., Defendants-Appellants.	APPEAL NOS. 94-15186 94-15188

ON APPEAL FROM THE

SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

APPELLEE RYOKO ITO'S BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RYOKO ITO, as Personal Representative of the heirs of AKINOBU ITO, Deceased, Plaintiff, vs. MACRO ENERGY, INC., et al., Defendants.	APPEAL NOS. 94-15186 94-15188 Supreme Court Consolidated Appeal Nos. 92-020 and 92-022

Pursuant to Rule 28-2.1, the undersigned, counsel of record for Plaintiff-Appellee Ryoko Ito, certifies that there are no known interested parties other than those participating in the case. These representations are made to enable judges of the court to evaluate possible disqualifications or recusal.

DATED this 11th day of May, 1994.

WILLIAM M. FITZGERALD

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STATEMENT OF THE CASE

This brief is in response to the briefs of Nobuo Hirai (hereinafter referred to as "Hirai"). Macro Energy, Inc. (hereinafter referred to as "Macro"), and Shigemi Yamagishi (hereinafter referred to as "Yamagishi"), who appealed to the Ninth Circuit Court of Appeals from a decision of the Supreme Court of the Commonwealth of the Northern Mariana Islands. The action was originally filed in the Superior Court of the Commonwealth under the Wrongful Death Statute. Two Japanese nationals. residing locally, two local corporations owned by Japanese, and an American insurance company were named as the defendants. The plaintiff is Japanese.

The United States was not a party, nor was any governmental agency. No federal statute or section of the U.S. Constitution was invoked in any of the pleadings. In fact. up to this point. there has been no implication of federal law whatsoever. The factual description of the events leading to the death of Ito have been well documented by the trial Court and repeated in the decision of the Supreme Court. The appellants have accurately recounted the facts in their brief, though they have little relevance to this appeal.

At the time the suit was filed and through the end of the trial. attorneys for American Home Assurance Company (hereinafter referred to as "American Home") also represented Macro. Hirai and Yamagishi. In the appeal to the Supreme Court. a belated recognition of a conflict resulted in a different lawyer for Hirai, while Macro and Yamagishi were and still are on this appeal represented by a single lawyer. The defense of this case which was dictated by the insurance company, defendant American Home was always one of a united front in which all simply denied responsibility. (Hirai E.R. p.9- 11).

Shortly before the first scheduled trial date, the Court, upon motion. dismissed all defendants based on an "Exemption Agreement" which had been signed by Ito. Shortly thereafter, the Court ruled that it had gone too far and revised its ruling to dismiss only Macro and Its alleged alter ego MOE. (Hirai E.R. p.30).

The next significant event. for purposes of this appeal, occurred in June 1992, when the plaintiff offered to settle with Hirai and Hirai accepted. Immediately after accepting the settlement offer on behalf of Hirai, his attorney had him sign an affidavit to support a motion for summary judgment on behalf of the three other defendants. This affidavit completely contradicted admissions made by Hirai's attorney based on sworn testimony given by Hirai in a previous deposition. Outraged, Ito's attorney revoked the settlement offer on the grounds that it was based on fraud and perjury. Almost three months passed before Hirai filed a motion to enforce the settlement. (Hirai E.R. p.31-45). Simultaneously, the defendants requested certification to get Supreme Court decisions on the rulings of the trial court. Ito opposed the certification on the grounds that the Supreme lacked jurisdiction to hear interlocutory appeals. The trial court agreed to allow the appeals to co up. but the Supreme Court dismissed the appeal. During the time when the appeal was taken up in October until it was dismissed in February, Hirai never attempted to have his motion heard. and even after the appeal was dismissed, he did not notice the motion for a hearing. even though the defendants brought other motions before the court. (R.T. Vol I at p.9-12. Hirai E.R. pp. 65-68).

Immediately prior to opening statements, in discussions to dispose of preliminary matters, Ito's attorney brought to the Court's attention. the fact that the motion to enforce the settlement while on file had never been noticed for a hearing and was mentioned in the defendants' pre-trial statement. At this point, Mr. Evans, the attorney for the defendants asked the court to hear the motion for summary judgment. The Court refused to

hear the motion based on the fact that it had not been noticed for a hearing. The Court made no ruling that would have prevented Hirai from presenting the issue of the settlement as part of his defense at trial. (R.T. Vol. 1 at p.9-12, Hirai E.R. pp. 65-68).

The trial proceeded and continued for two weeks. Judgment was entered against Yamagishi. Hirai and American Home. Ito appealed to the Supreme Court. the decision dismissing Macro and MOE, and the decision limiting American Home's liability to $100,000.00.

Yamagishi and Hirai appealed to the Supreme Court from the judgment rendered against them.

The Supreme Court reversed the trial court's decision dismissing Macro and Marianas Ocean Enterprises (hereinafter "MOE") and ordered that the judgment run against Macro and a hearing be had on whether MOE was the alter ego of Macro.

The judgment was affirmed by the Supreme Court in all other respects. Macro, Yamagishi. and Hirai appealed to this court from the decision of the Supreme Court claiming the Supreme Court had denied them due process.

Ito initially appealed the parts of the decision adverse to her. but has decided to dismiss that appeal upon concluding after research that this court does not have jurisdiction to hear appeals of local law mistakes by the CNMI Supreme Court.

JURISDICTION

It is the position of Ito that this court does not have jurisdiction because the questions presented are purely issues of local law. and this court may only hear appeals of cases involving the constitution. treaties or laws of the United States. The authority for this position is laid out in the first argument.

SUMMARY OF ARGUMENT

The primary argument is that this Court has no jurisdiction to consider this case because it is purely a question of local law, and is not a case involving the Constitution. treaties, or laws of the United States or any authority exercised thereunder. The appellants. in order to delay the

finality of the Judgement and or to get another bite at the apple, have attempted to make decisions on tort law and civil procedure into constitutional questions by claiming that the Supreme Court, by making erroneous decisions on these issues, have denied them due process of law. The appellants have failed to supply a single case that supports the proposition that an erroneous decision by a state court on matters of state law constitutes a denial of due process.

The arguments themselves are without merit, misrepresent the record and mistake the law.

ARGUMENT

I.

THE NINTH CIRCUIT DOES NOT HAVE JURISDICTION OVER APPEALS FROM THE SUPREME COURT OF THE NORTHERN MARIANA ISLANDS THAT DO NOT INVOLVE THE CONSTITUTION LAWS OR TREATIES OF THE UNITED STATES

In Sablan v. Manglona, 938 F.2d 970 (9th Cir. 1991), this court held:

"The Covenant as codified vests jurisdiction in this court only over cases involving the Constitution treaties, or laws of the United States or any authority exercised thereunder ....." 48 U.S.C. 1694 c(a).

"Here, not only was the CNMI Supreme Court's decision based solely on principles of local law, but no party ever raised a claim based upon a provision of the United States Constitution or a federal statute. This is not a case involving federal law. Therefore we lack jurisdiction of this appeal and dismiss."

Id. p. 971.

This appeal is likewise one that lacks any involvement with federal law. No issue of federal law or constitutional provision was raised in any of the pleadings in the trial court. and none of the briefs in the appeal to the Supreme Court contain any reference to a federal question. The issues on appeal here involve the denial of a motion for summary judgment. issue preclusion, interpretation of the Restatement of Torts 2d. and the standard

of care applicable to scuba diving instructors in Saipan. All without doubt questions of local law whose interpretation is solely within the responsibility of the CNMI Supreme Court. It Is only now that the appellants find themselves on the losing side of a Supreme Court decision that they attempt to transform these local issues into questions of federal law.

This case is very similar to Marquez v. Aviles, 252 F. 2d 715 (1st Cir. 1958), which was an appeal from a Puerto Rican Supreme Court decision that appellants were natural children for the purpose of bearing their father's name but not entitled to share in his estate.

"Appellants' due process argument assumes in their favor the very point of local law at issue, namely, whether under the law of Puerto Rico appellants have the legal status of heirs, entitled to share in the hereditary estates of Bonifacio Aviles Perez. Making that assumption, appellants say they have a property right. of which they have been deprived by the Commonwealth of Puerto Rico acting through its judicial branch. But if that assumption is found to be incorrect. as a matter of local law, the appellants have obviously not been deprived of any property right without due process of law. Of course "due process of law does not mean infallible process of law as Learned Hand, J., observed in Schechtman v. Foster 2 Cir., 1949. 172 F 2d 339, 341. It all gets back. then to a question of local law as to what are the legal rights of appellants as illegitimate children of any adulterous union."

Id. p. 717.

The argument made by the appellants in this case is identical to that made in Marquez, they assume that the local law is contrary to the decisions rendered on it by the Supreme Court, and by deciding, these question adversely to them. the Commonwealth of the Northern Mariana Islands, acting through its judicial branch, has deprived them of a property right without due process of law. The Marquez Court's conclusion on this argument is equally applicable to this case.

"This appeal is patently frivolous in so far as it seeks to torture the questions presented into federal constitutional questions."

Id. p.717.

The jurisdiction that this court has over appeals from the Supreme Court of the CNMI has been likened to the jurisdiction that the U.S. Supreme Court has over state court decisions --- limited to any federal question presented. Mafnas v. Superior Court, 936 F. 2d 1068, 1071 (9th Cir. 1991) citing Murdock v. City of Memphis, 87 U.S. 590, 22 L.Ed. 429 (1875).

The United States Supreme Court, when presented with similar attempts to transform purely local issues into federal questions by litigants from state courts, has summarily dismissed the appeals for want of jurisdiction. In New Orleans v. New Orleans Waterworks Co., 142 U.S. 79, 35 L Ed. 943, 12 Sup. Ct. Rep 142, the court, in granting a motion to dismiss on the basis that there was no federal question stated:

> "There must be at least color of ground for such agreement, otherwise a Federal question might be set up in almost any case. and the jurisdiction of this court invoked simply for the purpose of delay."

Id. at p.87.

See also Hamblin v. Western Land Co., 147 U.S. 531, 27 L. Ed. 267, 13 Sup. Ct. Rep. 353: St. Joseph & G.I R. Co. v. Steele, 167 U.S. 659. 42 L. Ed. 315, 17 Sup. Ct. Rep., and Wilson v. North Carolina, 169 U.S. 586, 42 L. Ed. 865, 18 Sup. Ct. Rep. 435.

In New Orleans Waterworks Co. v. Louisiana, 185 U.S. 336, 46 L.Ed. 936, 22 Sup. Ct. 691 (1902), the court, in dismissing, an appeal from the Louisiana Supreme Court which involved a contract action, made numerous statements which are strikingly applicable to the case before this court.

> "An examination of this question. among others, was made by the state court after full hearing by all parties, and all that can possibly be claimed on the part of the plaintiff in error is that such court erroneously decided the law. That constitutes no federal question."

> "They are all based upon the proposition that the judicial determination of these particular questions by the state tribunal was erroneous. and on account of such error the rights of the plaintiff in error under the Federal Constitution

have been violated. But mere error in deciding questions of this nature furnishes no ground of jurisdiction for this court to review judgments of a state court."

"...yet still the erroneous decision by the state court. admitting arguendo, that it was erroneous, raises no Federal question. This court does not and cannot entertain jurisdiction to review the judgment of a state court. solely because that judgment impairs or fails to give effect to a contract."

"The claim therefore that the forfeiture was a violation of the charter and of the contract therein contained, and was on that account a taking of defendant's property without due process of law, or that the state by such judgment had denied to defendant the equal protection of the law,--cannot obtain. Whether defendant had so violated its charter was a fact to be decided by the state court. that court had full jurisdiction over the parties and the subject-matter. and its decision of the question was conclusive in this case so far as this court is concerned."

"When analyzed. the whole claim is reduced to the assertion that in enforcing a condition which is impliedly a part of the charter, the state, through the regular administration of the law by its courts of justice. has by such court erroneously construed its own law. This court has no jurisdiction to review that determinations

"The assumption that the state court has refused to apply to the contract herein set up the general provisions of the law of contracts prevailing in the state and that therefore the state has taken through her judiciary the property of the plaintiff in error without due process of law,--is wholly without foundation. If it were otherwise then any alleged error in the decision by the state court in applying state law to the case in hand, resulting in a judgment against a party, could be reviewed in this court on a claim that on account of such error due process of law had not been given him. This cannot be maintained."

Id. p.351-353.

The appellants in this case have raised four issues on appeal which are more fully discussed further on.

(1) Hirai claims that he was denied due process because the trial court did not allow him to present his defense of settlement. Yet, an examination of the entire transcript of the trial shows that the issue was never presented to the court during the trial, and that the trial judge simply denied a motion for summary judgment that had not been noticed for a hearing prior to the start of the trial. Hirai could have presented the defense of settlement, but chose not to do so.

(2) Macro claims that it was denied due process because. although it did not participate in the trial, the Supreme Court decided that the judgment ran against it. This is an issue of tort law and issue preclusion. General principles of civil procedure as well as the Restatement of Judgments provide the governing law which once again is purely local. Dispositive of this issue are the admissions by defendant Yamagishi, that he owns all of the stock of Macro.

(3) Macro. Yamagishi and Hirai all claim that they have been denied due process because of the CNMI Supreme Court's interpretation of the Restatement of the Torts.

(4) Macro. Yamagishi and Hirai all claim that they have been denied due process because the Supreme Court affirmed the trial court's decision on the applicable standard of care for scuba diving instructors in Saipan.

These issues are all uniquely local without any federal connection, issues which the Supreme Court has the obligation to decide. Since the establishment of the CNMI Supreme Court. the Ninth Circuit appellate jurisdiction is limited to those cases with a federal connection. The Covenant is clear that this court is not to sit as a super supreme court reviewing all decisions of the CNMI Supreme Court.

This court recently reaffirmed this principle in Ferreira v. Mafnas, I F.3d 960 (9th Cir. 1993), stating, that the "...CNMI Supreme Court is the 'ultimate expositor' of local Northern Marianas law." The CNMI Court's interpretation of local law will only be examined if that interpretation is untenable or amounts to a subterfuge to avoid federal review of a constitutional violation. Ferreira involved a federal question from the start, the taking of real property based on an ethnic classification. Id. p.961. The cases cited in the Ferreira opinion are also cases that involved a

federal question from the start -- Habeas Corpus petitions. The same principle was explained in Mullaney v. Willburn, 421 U.S. 684, 44 L. Ed. 2d 508, 95 Sup. Ct., 881 (1975), in which the court said:

> "This court however repeatedly has held that state courts are the ultimate expositors of state law (citations omitted) and that we are bound by their construction except in extreme circumstances not present here."

Id. p. 691.

The court describes in footnote 11. "the extreme circumstances" as an interpretation of state law that appears to be "an obvious subterfuge to avoid consideration of a constitutional issue." It is difficult to conceive of the CNMI Supreme Court's interpretation of local law in this case as a subterfuge to avoid consideration of a constitutional issue, since there is not the slightest scent of a constitutional issue in this case, except for the claim that the due process rights of Macro, et at., have been violated by the erroneous decisions of the CNMI court on local law.

Accepting the appellants' argument on this issue, and accepting jurisdiction in this case means that regardless of how fair a decision of the CNMI Supreme Court might be, the losing party can have this court entertain his appeal and delay final resolution of the case simply by claiming that the court's stake denies him due process.

II.

DENIAL OF SUMMARY JUDGMENT MOTION FOR FAILURE TO PROPERLY NOTICE IT DOES NOT CONSTITUTE DENIAL OF DUE PROCESS

On the day set for the trial of this case, just as the trial was about to begin and various housekeeping, issues were being discussed, plaintiff's attorney called the court's attention to a motion for summary judgment on behalf of defendant Hirai that had been filed the previous September, taken off calendar and never re-noticed. Attorneys for Hirai who also represented Yamagishi. Macro. and the insurance company, requested that the court then hear the motion. The court denied the motion because it had not been properly noticed. (R.T. Vol I pp. 9-12; Hirai E.R. pp.65-68). Local Rules of Practice 8(c) requires that motions must be noticed for

hearing and filing, dates for opposition. as well as reply memoranda, are based on the noticed hearing date.

In order for the trial court to hear Hirai's motion. it would have been necessary to continue the trial so that an opposition could be filed. Since the trial was set to begin, and since both sides had stated that they were ready for trial, the court denied the motion. There was no other ruling on this issue.

Hirai's claims that he presented the defense of settlement at trial (Hirai brief p.23). that the court denied enforcing the settlement on the grounds that hearing the matter at trial was inconvenient (Hirai brief p.21), and that Hirai waited until the first day of trial because the trial judge instructed that it did not want to hear any more law and motion matters before trial (Hirai brief p. 20) are complete misrepresentations.

Hirai did not present the defense of settlement at trial. The only reference to the settlement is found in Vol. I at pages 9 through 12, when the court was addressing various pre-trial matters. This was a pre-trial motion that had not been properly noticed and the court simply stated:

> "Now at this point, to entertain this motion, the court will not..... will deny the motion.

(R.T. Vol. I p. 12:18-20; Hirai E.R. p.68).

There is no reference in Hirai's brief to any part of the transcript showing an attempt to put on evidence of the defense of settlement at any time during the trial.

Equally false is the statement that the court denied enforcing the settlement on the grounds that hearing the matter at trial was inconvenient. The court simply denied a summary judgment motion because the local rules require that it be noticed for a hearing. Nothing, prevented Hirai from presenting his "best defense" at trial. His lawyers were aware that this would be the appropriate action to take. and stated:

> **"If Your Honor would prefer that it be a matter of proof at some time during, the trial then that would be acceptable to us too."**

(R.T. Vol I p. 11:7-9; Hirai E.R. p.67). The court made no comment to this, made no order precluding evidence of the settlement. vet Hirai's lawyers never attempted to introduce evidence of the settlement.

The explanation that Hirai waited until the pre-trial briefs and the first day of trial to raise the issue because the trial judge instructed that it did not want to hear any more law and motion matters before trial. defies common sense and is belied by the record.

Two motions were heard by Judge Castro on April 7, 1992. One was a motion to amend a prior ruling by Judge Hefner, and the other was a motion for summary judgment. Judge Castro ruled on theses two motions only and cave no instruction on the filing of other motions.

> "The court specifically finds that the motions are untimely. They should have been filed and heard earlier, and one of the golden rules of judges in terms of motion to reconsider previous orders is a judge or another judge considering another judge's motion should not try to act as an appellate court. In looking at the summary judgment entered by Judge Hefner, the amended summary judgment and the time that these motions come before the court, if I address or if I grant these motions now, today, I will in fact be acting like an appellate court. For those reasons, both motions are denied. Thank you gentlemen."

(Reporter's Transcript of Motion for Reconsideration by Defendants, Motion for Summary Judgment by Defendants, April 7, 1992 p. 15:14-16:6; Supp. E.R. pp.8 & 9).

Rather than blaming the trial judge, Hirai should look to his lawyers for failing to get his settlement heard. One possible reason for their failure is their concern for their credibility in front of Judge Atalig, since Judge Hefner had found that either Hirai or his counsel had made misleading statements.

The offer of settlement was made on June 21, 1991, almost a year prior to the trial. It was withdrawn on June 27, 1991, based on the filing of an affidavit of Nobuo Hirai. The letter withdrawing the offer makes clear that the plaintiff wanted to deal with Hirai, but that perjury and the representation of both defendants by the same lawyers was preventing that. (Hirai E.R. p.31).

In a subsequent hearing in which plaintiff attempted to hold the defendants to previous admissions. the Court made the following statements:

> THE COURT: I think Mr. Fitzgerald's main thrust here is back in December, you put all these things in your memorandum saying out air, out of air, out of air. And you must or Hirai, your own client, either mislead you or you mislead Mr. Fitzgerald or something because now all of sudden, oh! air, air, air.

(Transcript, June 26, 1991, p.46:20-25; Supp. E.R. p. 6).

From just these basic facts, this Court can see that a substantial defense to any claim for enforcement of the settlement was likely and that the hearing on this issue would raise substantial questions regarding the credibility of Hirai and his counsel. The court did not prevent Hirai from putting on a defense of settlement. Hirai and his counsel affirmatively decided not to do so.

III.

THE COURT CORRECTLY ORDERED JUDGMENT TO RUN AGAINST MACRO ENERGY, INC. BECAUSE YAMAGISHI IS SOLE OWNER OF MACRO

Macro claims that it has been denied due process by the Supreme Court's decision to apply the judgment to it. They cite a number of cases with which we have no problem, but which are inapplicable and, therefore, of no value to the proper resolution of this case. Macro ignores the fact that defendant/appellant Yamagishi is the sole owner of all the stock of defendant/appellant Macro Energy, Inc. (Ito brief pp. 14 & 15).

Macro admits that the federal courts rely "upon the doctrine of virtual representation" (Macro brief p. 18) and apparently does not consider this doctrine violative of due process, but asserts that the doctrine does not apply when the interest of the representative of the non-party are antagonistic to or are not sufficiently close with those of the non-party. Again, we have no problem with this as a statement of law, but dispute that it has any relevance to our factual situation. According to Macro, the

Supreme Court implicitly recognized a divergence in the interests between Macro and its employees, Hirai and Yamagishi, because Macro could defeat liability by pleading and proving that Yamagishi and Hirai acted outside the course and scope of their employment. Hirai explained the court's inability to find any evidence in the record to support a possible defense under this theory by the failure to have separate counsel.

In making this argument, Macro has overlooked the gross ethical problem it invokes. The lawyer representing both Macro and Yamagishi is advocating a position that would relieve one of his clients at the expense of the other. If Macro's position had any validity, it could not ethically be pursued by the lawyer who also represents Yamagishi, since Yamagishi's one-third burden of the judgment split among Yamagishi, Hirai and Macro would be increased to one-half if his lawyer succeeds in having Macro relieved of the judgment.

The continued representation of Macro and Yamagishi by one lawyer throughout the litigation. even through this appeal clearly highlights the bogus nature of the argument that Macro and Yamagishi's interests are antagonistic and demonstrates conclusively that their interests are identical. This position is further strengthened by an examination of the applicable law and relevant parts of the record.

Restatement of Judgments §84 states:

> A person who is not a party but who controls an action, individually or in co-operation with others, is bound by the adjudication of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound.
>
> Comment:
>
> a. rationale-..... A person is entitled only to one adjudication of a cause of action or of an issue where he has control of the proceedings; if under the circumstances to which this Section applies a person has control over or participates in the control of the

> proceedings it is not unfair to him that the judgment or the adjudication Should determine the existence and the extent of interests which are dependent upon the determination of issues in the action leading to the judgment.

Macro Energy purchased the American Home insurance policy that covered it as the named insured and Yamagishi as a shareholder of the named insured. (Macro brief p. 5). The same lawyers represented Macro Energy and Yamagishi until they secured the dismissal of Macro Energy. Lawyers paid for by the insurance company, pursuant to the policy purchased by Macro Energy, continued to represent Yamagishi through the trial. Lawyers paid for by the insurance company, pursuant to the policy purchased by Macro Energy, represented both Macro Energy and Yamagishi together on the appeal.

At trial, Yamagishi testified that:

Q. Would you please state your full name for the record?
A. Shigemi Yamagishi.
Q. What is your occupation. sir?
A. I'm ... now the owner of a company. President.
Q. And what company is that?
A. Macro Energy.
Q. And you are the major shareholder of that company?
A. Yes.
Q. And are you also an officer of that company?
A. Yes.
Q. You're the president and a director. is that right?
A. Yes.
Q, And Macro Energy is the successor company to Marianas Ocean Enterprises?
A. I bought it.
Q. You bought the diving operations of Marianas Ocean Enterprises and chanted it to Macro Energy, is that right?
A. Yes.
Q. And are you the chief diver.... chief dive instructor of Macro Energy ?
A. Yes.

(R.T. Vol. III p.224:2-21; Supp. E.R. p. 11).

In the deposition which Macro Energy used to support its successful motion for summary judgment, Yamagishi testified:

Q. There's a company called Macro Energy, Inc. Are you related to that company in any way?
A. Yes.
Q. What's your relationship to that company?
A. It's my company.

(Depo. of Yamagishi, August 17, 1990, p. 8:2-6; Supp. E.R. p.2).

Q. Okay. Take a look at Exhibit C. Now, it's your testimony that as of today you own 100 percent of Macro Energy. Correct?
A. Yes.

Id. p.20: 24-21: 1; Supp. E.R. pp. 3 & 4.

Yamagishi owned 100% of the shares of Macro Energy, he was the president, director and the chief dive instructor of Macro Energy. He is also the person who signed Ito's certification as a diver and was the lead guide on the dive that took Ito's life. (Findings of Fact. pp. 7, 24 & 34; Hirai E.R. pp. 5 & 9). He, therefore, possessed all the information that Macro Energy had about this incident. As president and director, he had a fiduciary obligation to Macro Energy to act to protect its interest in this law suit. As the owner of all the shares of the company, it was in his financial interest to do so. In fact, through the lawyers provided by the policy in Macro Energy's name, he presented a vigorous defense, calling experts and other witnesses to deny negligence on the part of himself and Hirai, and accusing Ito of contributory negligence and assumption of the risk. Yamagishi did everything that Macro Energy could have done in the trial of the suit, and their unity of interest should, therefore, preclude Macro Energy from getting another bite of the apple.

The doctrine of privity extends the conclusive effect of a judgment to nonparties who are in privity with parties to an earlier action. In Chicago R.I. & P. Ry Co. v. Schendel, 270 U.S. 611, 46 S. Ct. 420, 70 L. Ed. 757 (1926), the Supreme Court characterized the relationship as one of "substantial identity" between parties 270 U.S. at 621 46 S. Ct. at 424.

U.S. v. ITT Rayonier Inc., 627 F. 2d 996 (9th Cir. 1980).

> Privity exists when there is a "substantial identity between parties, that is. when there is a sufficient commonality of interest". (citations omitted). When a person owns most or all of the shares in a corporation and controls the affairs of the corporation, it is presumed that in any litigation involving that corporation the individual had sufficient commonality of interest. (citations omitted). As this court has stated before, the public policies underlying the doctrine of collateral estoppel, as a bar to repetitious litigation, would support a finding of privity between a close corporation and its sole or controlling stockholder. (citations omitted).
>
> Here it is undisputed that Gottheimer owned all the outstanding shares of CCNS stock and exercised control over its day to day affairs. Thus, there is no question that privity exists and we conclude upon a de novo review of this legal issue that the lower court decided the issue correctly.

In Re Gottheimer, 703 F. 2d II 36, 1140 (9th Cir. 1983).

> It would seem the public policy underlying the doctrine of res judicata, as a bar to repetitious litigation, would support a finding of privity between a lose corporation and its sole or controlling stockholder.

1 B Moore's Federal Practice (Second Edition) par. 0.422.

> Courts have recognized that a non-party may be bound if a party is so closely aligned with its interests as to be its "virtual representative".

Aerojet Gen'l Corp. v. Askew, 511 F.2d 710, 719 (5th Cir.).

> Privity can be found if one party "controlled the earlier lawsuit and its interest were represented by the

> party to the first suit" (citations omitted). Here it is clear that Evans was in privity with Tarpon because he was the president and major stockholder of the corporation and he admitted by deposition that he made the ultimate decisions. In addition he was the only witness for Tarpon in the Louisiana suit. It is apparent, therefore, that Evans controlled the earlier suit and had his interests represented therein.

Drier v. Tarpon Oil Co., 522 F.2d 199, 200 (5th Cir. 1975).

And if all of this were not enough, there is a section of the Restatement of Judgments directly applicable to this factual situation. Restatement of Judgments 2d -59 entitled, "Corporation and Its Officers, Directors, Stockholders, and Members" states in pertinent part:

(2) .....

(3) If the corporation is closely held, in that one or a few persons own substantially the entire ownership in it, the judgment in an action by or against the corporation or the holder of ownership in it. is conclusive upon the other of them as to Issues determined therein as follows:

(a) .....

(b) The Judgment in an action by or against the holder of ownership in the corporation is conclusive upon the corporation except when relitigation of the issue is justified in order to protect the interest of another owner or a creditor of the corporation.

The rationale for this rule is explained under comment "e" at page 99:

> "When the corporation is closely held. however, interests of the corporation's management and stockholders and the corporation itself generally full coincide. By definition, the stockholders are few in number and either themselves constitute the management or have direct personal control over it."
>
> "For the purpose of affording opportunity for a day in court on issues contested in litigation, however, there is no good reason why a closely held corporation and its owners should

> be ordinarily regarded as legally distinct. On the contrary, it may be presumed that their interests coincide and that one opportunity to litigate issues that concern them in common should sufficiently protect them both."

The facts before this court clearly puts Macro within this category and even the case of In Re Bendectin Products Liability Litigation, 732 F.Supp. 744 (E.D. Mich. 1990) cited at page 22 of Macro's brief, supports Ito's position on this.

> "To have control over litigation, a party must have effective choice over which legal theories and proofs are advanced. (citations omitted). Examples of such control are: a president and sole shareholder controls his company."

Id. at p. 747.

IV.
IT IS THE DUTY OF THE CNMI SUPREME COURT TO DETERMINE THE APPLICABLE LAW OF THE CNMI

Despite the fact that Macro, et al., conducted extensive discovery, filed numerous motions, participated in a two week trial and some four hours of oral argument before the Supreme Court. they claim that they have been denied their constitutional rights to a meaningful hearing.

The first problem with this argument is that it is being raised for the first time on this appeal. Except for the reversal of Macro's release. the issues were decided by the trial court, and if there were any due process denial, it should have been brought before the Supreme Court. It was not. Having, lost in the Supreme Court, they are making purely makeweight arguments in an attempt to add bulk and a veneer of legitimacy to an otherwise frivolous appeal.

Unencumbered by legal authority. Macro, et al., make two sweeping statements to evidence their due process denial. First, they say that the Supreme Court failed to apply controlling law in determining whether the release shielded the defendants. Next, they claim that the controlling law is what they perceive to be the majority interpretation of Restatement of Torts §4496B which the Supreme Court is required to follow.

Both of these statements are incorrect. While the Supreme Court is of course bound to follow the Restatement of Torts, 7 CMC 3401, there is no authority for the proposition that it must follow a majority interpretation, or that in fact, there is a majority interpretation. Hirai claims:

> "The CNMI Supreme Court is bound by statute to follow the Restatement of Law of Torts and Contracts as expressed by the majority of the United States jurisdictions. (7 CMC §3401)."

(Hirai brief p. 31).

While Macro and Yamagishi state:

> "The majority of jurisdiction(sic) interpreting Section 496 have held that to be effective, a release need not contain specific reference that the releasor is to assume the risk of harm arising from the releasee's negligence or reckless conduct."

(Macro and Yamagishi brief p.25).

They cite five cases to support this position. Heil Valley Ranch Corp. v. Simpkin, 784 P.2d 781 (Colo. 1989); Schutkowski v. Carey, 725 P.2d 1057 (Wyo. 1986); Trainor v. Aztlan Cycle Club, Inc., 147 Wis. 2d 107, 432 N.W. 2d 626 (1988); Hewitt v. Miller, 11 Wash. App. 72 244 (1974); Sanez v. White Water Voyages. Inc., 266 Cal. App. 3d 758, 276 Cal. Rptr. 672, (1990).

None of these cases interprets Section 496B or makes any reference whatsoever to the type of language required in a release drafted pursuant to this section. The only reference in any of these cases to Section 496B relates to public policy and not to the required language of a release.

In contrast to the appellants' failure to provide any authority for their position, the opinion from the Supreme Court makes clear that it is following the Restatement of Torts §496B.

> "In interpreting Section 496B, however. we shall side with those jurisdictions which take the more cautious approach

with respect to express assumption of the risk."

(Supreme Court Opinion p. 20: Hirai E.R. p. 1 13).

The court then states that even under the law of those jurisdictions that do not require this express language. the release in this case would fail to exonerate defendants (Supreme Court Opinion p.22: Hirai E.R. p. 115). The court also specifically addressed an argument relating to Comment d of Section 496B and expressed its reasoning for finding that:

> "...even under Comment d, we do not read the release's general clause' as exempting the negligent defendants from liability."

(Supreme Court Opinion p.23; Hirai E.R. p. 116).

If it were not clear up to this point, the following statement makes abundantly clear that the Supreme Court decided this case pursuant to the Restatement.

> "The release at issue in this case does not meet the requirements of Restatement (Second) Torts, Section 496B."

(Supreme Court Opinion p.23; Hirai E.R. p. 116).

V.

DETERMINING THE STANDARD OF CARE IS THE DUTY OF THE TRIAL COURT

Once again, we are faced with a due process argument that was not brought to the attention of the Supreme Court. The degree of skill and care that may be required of a professional is a question for the jury, Bartak v. Bell Galyardt & Wells. Inc., 629 F.2d 523 (8th Cir.). The Supreme Court rejected the arguments that the trial court had erroneously decided the issue. Now, for the first time, the appellants claim a denial of due process. Not a single case is cited in this argument and the testimony of their own expert relied on in the trial and the appeal in the Supreme Court is abandoned in favor of a few sentences from Midori Horikawa, a witness called by the plaintiff. (Macro brief p.32).

The trial court listened to extensive testimony on this issue and decided that the ADS standard failed to meet the standard of care required of scuba diving instruction in Saipan, CNMI. In fact, there are no ADS standards as the CNMI Supreme Court noted in its opinion.

> "Second, there apparently is no ADS 'standard' for dive courses or other diving requirements. Defendants' own dive expert testified that he is 'not familiar with any [ADS standard]' and that ADS 'refer[s] to the CMAS standard.' In light of this, we cannot say that the trial court erred in applying the CMAS standard."

(Supreme Court Opinion p.31; Hirai E.R. p.24).

Finally, the claim that the ADS standard (whatever it might be) is adhered to by dive shops and dive instructors throughout Saipan (Macro brief at p.33) is without foundation in the record because it is simply untrue. At trial, the defendants' expert, Mitchell Warner, attempted to establish that the course that the decedent was given in this case set the standard for Saipan because it was the same course given by the other dive shops in Saipan. Upon cross examination, he was unable to identify any of the sources of his information. (R.T. Vol. XIII p.999:3-5: 1002:6-13; Supp. E.R. pp. 13 & 14). Called in rebuttal, the president of the Northern Marianas Diving, Operators Association testified as to the names and professional affiliation of the dive shops in Saipan. Almost all of them belong to PADI, NAUI, or CMAS, international organizations with specific standards. (R.T. Vol. XIII p. 1032-1033:3: Supp. E.R. pp. 15 & 16). There is absolutely no support for the position that the Saipan instructors and shops accept ADS as a standard for Saipan.

CONCLUSION

This is a frivolous appeal taken solely to delay the final resolution of this matter. The due process denial claims have been manufactured to invoke this court's jurisdiction. The arguments themselves are spurious, without regard for supporting legal authority, grossly misrepresenting the record and carelessly misstating the applicable law. This appeal should be summarily dismissed for lack of jurisdiction or alternatively affirmed in all respects.

RESPECTFULLY SUBMITTED this 11th day of May, 1994.

WILLIAM M. FITZGERALD
Attorney for Appellee Ryoko Ito

ADDENDUM

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
COMMONWEALTH SUPERIOR COURT

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(b) Flat Filing. in order that files in the clerk's office may be kept under the system commonly known as "flat filing", all papers presented to the clerk or judge for filing shall be flat and unfolded.

(c) Flyleafs. No flyleaf shall be attached to any paper. All papers shall be filed without backs and shall be neat, clean, legible and free of interlineations.

(d) Format. The first page of all Papers, except as provided hereinbelow in (e) shall be in the following form;

(1) The space at the top left of the center of the page shall contain the name, office address including the Zip Code and telephone number of the attorney for the party in whose behalf the paper is filed, or of the party if he is appearing in person;

(2) The space at the top right of the center of the page shall be left blank for use by the Clerk of Court

(3) There shall be centered the name of the court, which shall not be less than three inches from the top of the page;

(4) The space to the left of the center of the page and below the name of the court shall contain the title of the cause, which title shall include the names of all of the parties. Thereafter, the title in all subsequent pleadings may be appropriately abbreviated.

(5) In the space to the right of the title of the cause, there shall be listed the case number followed by the title of the paper (which shall include an appropriate notation of a jury trial is demanded in the paper).

(6) Certification or acknowledgment of service may be entered in the bottom margin of the first page.

(e) Multiple Pleadings. Where two or more pleadings or other papers are filed together, only the first page of the first paper shall follow all of the requirements of (d) Wherein above. In addition thereto, there shall be listed and combined after the case number, the title of the paper, and the titles of all of the other papers that are being filed together.

(f) Acceptance for Filing. Any paper which does not comply with this rule will not be accepted for filing; except with the prior approval of the Court.

Rule 8
MOTIONS

(a) Submission of Motion and Opposition to Motion.

(1) Submission of Motion. A party making a motion may (and, if the motion involves a question of the interpretation of law, shall) file together with the motion a separate memorandum of reasons, including citation of supporting authorities, why the motion should be granted. Affidavits and other documents setting forth or evidencing facts on which the motion is based shall be filed with the motion.

(2) Submission of Opposition to a Motion and a Reply Thereto. A party opposing a motion may file and serve any opposition to the motion not later than five (5) days preceding the noticed date of hearing, unless another period is fixed by order of the court. The party may (and, if the movant has filed a memorandum, shall) file together with the opposition to the motion a separate memorandum of reasons, including citation of supporting authorities, why the motion should not be granted. Affidavits and other documents setting forth or evidencing facts on which the opposition is based shall be filed with the opposition. The movant shall serve and file any reply to. the opposition not less than two (2) days preceding the hearing date.

(b) Service. All papers filed pursuant to Section (a) of Rule shall be served.

(c) Notice of Hearing. Together with the filing of a written motion, a Notice of Hearing shall be attached to and made a part of the pleadings. The day, date, and time of hearing shall be designated and inserted by counsel. Service of a copy of the pleadings shall be made upon opposing counsel or party by the movant in accordance with the Commonwealth Rules of Civil Procedure - Rules 5 and 6. A certificate of Service shall be filed by the movant with the clerk of court on or before the date of hearing.

Rule 9
DEPOSITIONS

After being filed, unless the court directs otherwise,

(1) Depositions pending action taken pursuant to Rule 26, Commonwealth Rules of Civil Procedure, may be opened by the clerk and made available for inspection and copying on the request of counsel for any party to the proceeding or by a party appearing pro se;

(2) Depositions before action or pending appeal taken pursuant to Rule 27, Commonwealth Rules of Civil Procedure, may be opened by the clerk and made available for inspection and copying on the request of any person served with notice pursuant to Section (a) (2) of that rule, or by his counsel.

Rule 10
INTERROGATORIES; REQUESTS FOR ADMISSION

(a) Form of Response.

(1) Answers and objections in response to interrogatories served pursuant to Rule 33, Commonwealth Rules of Civil Procedure, and statements and objections in response to requests for admission served pursuant to Rule 36, Rules of Civil Procedure. shall be made and numbered in the order of the interrogatories or requests for admission.

(2) An answer, statement or objection need not be preceded by the interrogatory or request for admission to which it responds.

(3) Each objection and the grounds therefor shall be stated separately.

(b) Provisions of Rule 8 Applicable to Objections. The provisions of Rule 8 of these rules shall be applicable to objections to interrogatories and objections to requests for admission.

END Q

APPENDIX R

Consolidated U.S. Court of Appeals Docket
Nos.: 9415186 and 94-15188

DC No. CV-92-20-JSDC; Northern Mariana Island

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RYOKO ITO, as Personal Representative
of the heirs of AKINOBU ITO, Deceased

Plaintiff,

v.

MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI AND AMERICAN HOME ASSURANCE CO.

Defendants.

ON APPEAL FROM THE SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

REPLY BRIEF
OF
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I.
INTRODUCTION

Appellee's Brief is more significant in what it silently concedes than in what it contests. Plaintiff Appellee Ryoko Ito (Ito) essentially concedes the existence of a valid settlement agreement by which Hirai should have been dismissed, but she argues that this court has no jurisdiction over this injustice.

Ito concedes that Macro may have been denied the right to a trial, but argues that this is a technicality over which this court has no jurisdiction.

Ito ignores the fact that the CNMI Supreme Court failed to follow its own law with regard to written waivers for dangerous recreational activities, but argues that however untenable the Supreme Court's rulings, this court has no jurisdiction to correct the injustice.

Ito refuses to acknowledge the fact that the CNMI Supreme Court failed to follow its own law with regard to applying the proper standard of care, but argues that however untenable the court's ruling, this court has no jurisdiction to correct the injustice.

Ito is not correct. This court does have jurisdiction to correct four significant injustices:

1. Denial of a hearing to consider Hirai's valid settlement agreement.

2. Denial of Macro Energy, Inc.'s (Macro) right to a trial.

3. Refusal to enforce a written waiver and express assumption of risk in violation of CNMI law.

4. Failure to apply a local standard of care in violation of CNMI law.

Appellee's Brief fails to argue the substance of these issues. Instead Ito misrepresents the proceedings in the courts below and pretends that the right to a hearing, the right to a trial, and the right to tenable and consistent application of the law have no place in a discussion of due process. of course these considerations are at the core of procedural and substantive

due process, and should not be lightly set aside in the interest of convenience or expedience.

If Defendant Appellant Nobuo Hirai (Hirai) had received these rights he would have been dismissed from this action. At its core, due process is about fundamental fairness. The trial court and CNMI Supreme Court have combined to effectively deny fundamental fairness to Hirai. This court has the power to correct these constitutional due process violations. (48 U.S.C. §1694c(a))

II.
ARGUMENT

A. The 9th Circuit Has Jurisdiction over Issues Of Procedural And Substantive Due Process

In her appellee's brief, Ryoko Ito (Ito) relies almost entirely upon a single argument:

> "The primary argument is that this court has no jurisdiction to consider this case because it is purely a question of local law, and is not a case involving the Constitution, treaties or laws of the United States or any authority exercised thereunder. The appellants, in order to delay the finality of the judgment and/or to get another bite at the apple, have attempted to make decisions of tort law and civil procedure into constitutional questions by claiming that the Supreme Court, by making erroneous decisions on these issues, have (sic) denied them due process of law." (Appellee's brief, pages 3-4; emphasis added.)

Appellee's brief rests upon a faulty foundation. Issues of "civil procedure" involving denial of the right to be heard are, by there nature, issues of procedural due process. Issues of "tort law" involving arbitrary, capricious and untenable application of the law are, by there nature, issues of substantive due process. As stated above, at its core due process means fundamental fairness. Black's Law Dictionary 449 (5th ed. 1979). Hirai's

appeal rests upon solid foundation: the right to a hearing, the right to a trial, and the right to be free from arbitrary capricious and untenable application of the law.

"Procedural due process" dictates that parties whose rights are to be affected in an action are entitled to be heard. Parham v. Cortese, 407 US 67, 92 S.Ct. 1983, 1994, 32 L.Ed. 2d 556 (1972). Thus, the guarantee of procedural due process requires that the trial court hear and consider appellant Nobuo Hirai's settlement agreement. It also requires that the previously dismissed appellant Macro Energy, Inc. be given a trial prior to imposition of a 2.4 million dollar judgment against it. Notably, Ito essentially concedes to the fact that if a new trial is granted to Macro, a new trial must be granted to all defendants to avoid inconsistent judgments within the same action.

"Substantive due process" amounts to protection from arbitrary, capricious and untenable action. Substantive due process may be roughly defined as the constitutional guarantee that no person shall be deprived of life, liberty, or property for arbitrary reasons. Such a deprivation is constitutionally supportable only if the conduct from which the deprivation flows is proscribed by reasonable legislation, reasonable applied. (16A Am Jur 2d, Constitutional Law §816.) Thus, principles of substantive due process guarantee that defendants will not be subject to capricious and untenable application of the laws of the Commonwealth of the Northern Mariana Islands (CNMI). (Ferreira v. Borja 1 F 3d 960 (9th Circuit 1993) This includes capricious and untenable application of the law regarding enforcement of a waiver and express assumption of risk, and application of the proper standard of care.

Finally, Ito appears to argue that this court has no jurisdiction over the constitutional due process violations in the courts below on the supposed grounds that:

> "No issue of Federal Law or constitutional provision was raised in any of the pleadings in the trial court, and none of the briefs in the appeal to the Supreme Court... ." (Appellee's Brief, page 4.)

Ito cite's Sablan v. Manglona, 938 F 2d 970 (9th Circuit 1991) to support this false premise. Plaintiff's argument is equivalent to telling one who

asks for a hearing prior to being put before the firing squad, that he has no right to complain of a lack of a hearing because he failed to specifically invoke the applicable clauses of the 5th and 14th amendments; he just asked for a hearing. Ito's argument is based upon a plain misstatement of both the law and the facts.

In Sablan, supra, relied upon by Ito, the appellant sought a favorable interpretation of the CNMI Constitution and attempted to bootstrap this issue as a federal claim on the grounds that the CNMI Constitution was made possible by federal law. Not surprisingly, this court did not find this to be an issue affecting the federal laws, treaties or constitution of the United States and dismissed on jurisdictional grounds. The case at bar, on the other hand, involves clear due process violations which were raised both before the trial court and the CNMI Supreme Court (See Hirai's Opening Brief, pages 25-27.)

B. Ito Misrepresents The Proceedings Below Regarding The Trial Court's Refusal To Consider Hirai's Settlement Agreement

1. Settlement Agreement

Ito essentially concedes the existence of a valid settlement agreement:

> "... plaintiff offered to settle with Hirai and Hirai accepted." (Appellee's Brief, page 2.)

Ito's only defense against enforcement of this contract is a rhetorical allegation (without any support either in or outside the record) that Hirai made misstatements under oath collateral to the contract./1/

/1/ Ito asserts, without basis in or outside the record that Hirai signed an affidavit which contradicted previous admissions by his attorney and which supposedly contradicted Hirai's deposition testimony. Notably, Ito does not even include either the affidavit or the deposition testimony in her excerpts of record. Instead, she only includes a confused excerpt from a hearing transcript. (Appellees brief, pages 12-13.)

In fact, Ito's entire argument is extremely misleading.

(footnote continued)

(Appellee's Brief, pages 10-13.) Ito does not even attempt to explain why her disappointment in Hirai's affidavit justified repudiation of a completely executed settlement contract. Fraud in the inducement to a contract may make it voidable. (Restatement of Contracts, 2d §164.) However, fraud collateral to the contract clearly does not. Thus Ito's argument that the settlement agreement is made voidable not by fraud in the inducement to the settlement contract, but by fraud collateral to the contract has no merit.

Plaintiff has never made a persuasive argument for avoidance of the Hirai settlement contract either to the trial court, the CNMI Supreme Court, or this court. There is no defense to enforcement of the settlement.

Only the denial of a hearing of that defense has prevented the proper dismissal of Hirai from this action.

2. The Right To A Hearing

Ito explains the trial court's ruling on the settlement agreements as follows:

> In order for the trial court to hear
> Hirai's motion, it would have been

(footnote continued from previous page)

Early in the litigation it was believed by the attorneys that Ito's air tank ran out of air causing the loss. Hirai's later affidavit supported a different theory, that the tanks had air but that the regulator was defective or may not have worked properly. Hirai did not contradict his earlier deposition testimony. (He was not asked.)

> necessary to continue the trial so that an opposition could be filed. Since the trial was set to begin, and since both sides had stated that they were ready for trial, the court denied the motion. There was no other ruling on this issue.

(Appellee's Brief, page 10.)

Ito goes on to argue that the trial court's refusal to consider the settlement agreement by motion did not mean the trial court could not consider the settlement agreement at trial if asked. Ito misrepresents the proceedings in both the trial court and the CNMI Supreme Court with respect to the issue of Hirai's settlement agreement. Ito would have this court believe that the trial court directed that the defense of Hirai's settlement agreement should be put on during trial, but not on the first day of trial because of a supposed lack of notice of the motion. (Ibid.)

Ito would further have this court believe that the trial court was willing to hear Hirai's defense at trial, but that Hirai simply decided not to raise it for no good reason. (Appellee's Brief, page 11-13.)/2/

/2/ Ito makes the baseless argument that the defense was willing to raise this issue on the first day of trial, but was afraid to raise the issue at other stages of trial because it "would raise substantial questions regarding the credibility of Hirai and his counsel." (Appellee's Brief, page 13.) Ito's assertion is specious for two reasons. First, the supposed credibility gap is mere rhetoric. (See

(footnote continued)

Ito's argument has no merit for two reasons: (1) It is not supported by the actual record, and (2) it is not supported by common sense.

The record of the first day of trial reveals the actual proceedings. First the court discussed other pre-trial matters such as the taking of a deposition on an evening during the trial. Then the court stated:

THE COURT: ... taking a deposition of the witness during trial is ... anything else?

MR. FITZGERALD: [Attorney for Ito] Yes, your honor, there is one further point. Well, just the ...the question of the ... there's another motion outstanding. The defendants have filed a motion to enforce a settlement, and this has never been set, and one of the points of the settlement was that the person who was offered the settlement, who agreed to the settlement, was to cooperate to the plaintiff prior to the trial. So, I think the whole thing is pretty much moot at this point, and I would just request, or ask the court that this motion be denied or deemed untimely, or whatever so we don't have to be bothered with it.

* * *

MR. FITZGERALD: ... My position in understanding on that motion for summary judgment is that when we went into that motion we were operating on the ... with the understanding that the defendants had admitted that Mr. Ito, the decedent, had run out of air. And this also had something to do with the settlement offer. And then, I believe this was last June, the response came back that in fact Mr. Ito had not run out of air, that he had ... and Mr. Hirai, the defendant, came up with a new affidavit. ... and then

---

(footnote continued from previous page)

footnote 1 above.) Second, the issue had already been raised before the trial court.

...So, but the other issue is a Settlement motion. I think its kind of moot at this point and I'd just ask that it be denied.

* * *

MR. FITZGERALD: ...This point, again goes back to last summer, and the settlement offer was revoked after Mr. Hirai filed his affidavit, changing what we had perceived as a judicial admission.

* * *

THE COURT: We have about seven files this thick here, and these are matters that should have been taken up before trial. That's why I asked the parties, "Are you ready for trial?". Now, at this point, to entertain this motion, the court will not ... will deny the motion. (Hirai ER pages 64-68; emphasis added.)

As one can see from the actual record it was Ito who raised the issue of the settlement agreement on the first day of trial and argued to the court that it was "moot" and "we don't need to be bothered with it." After discussion of the issue and the court's complaints confirming that it did not want to be "bothered with it", the court denied the defense of the settlement agreement, apparently without considering its merits.

Ito now argues that the defense should have been raised later, perhaps on the second day of trial. But during trial Ito argued that the defense should have been raised earlier, and that the defense was "kind of moot" because at the trial the court did not have to be "bothered with it."

Ito argues that the trial court denied the Hirai settlement agreement defense on the grounds of a lack of notice. The CNMI Supreme Court did not adopt Ito's misrepresentation of the trial court proceedings. The CNMI Supreme Court's error was much more straight forward. Clearly the Supreme Court found the trial court's ruling was based upon a desire to control its docket:

> "The trial court did not abuse its discretion in not hearing defendants Hirai's motion for summary judgment on the day of trial. Hearing the motion would have meant continuing the trial to another day. A continuance would have required a shifting of the court's docket. Under the circumstances, we do not find an abusive discretion by the

> trial court since the issue involved the court's control of its docket." (Hirai's ER page 128; emphasis added.)

Thus, the issue was not the protection of Ito's right to notice. The issue was whether the trial court's convenience and power to control its own docket took precedence over the due process rights of the parties. The CNMI Supreme Court erroneously ruled that it did.

C. Macro, Previously Dismissed, Had No Reasonable Expectation Of Being Bound By The Judgment And Has A Right To A Trial Which Must Result In A New Trial For All Defendants.

1. Macro had no reasonable expectation of being bound by the judgment.

In this case Macro was dismissed from the action seventeen months prior to trial, and held responsible for the judgment sixteen months after the trial. During the course of the trial neither Macro nor any other party to the action had any expectation that Macro would be held liable for the judgment. Ito's arguments regarding privity and virtual representation notwithstanding, there is no authority to support an appellate court imposing a judgment upon a party dismissed prior to trial.

Essential to the concept of fundamental fairness embodied by the due process clauses of the 5th and 14th amendments is the concept that the parties should have a reasonable expectation as to what is at stake in the litigation. This reasonable expectation certainly must include who is a party to the lawsuit and what assets (i.e.: Corporate Assets) are at stake in the law suit. Under Ito's analysis, if defendants own a controlling interest of any other corporate entities, judgment should now be imposed without a trial upon those corporate entities as well. Obviously, fundamental fairness guaranteed by constitutional due process precludes such arbitrary and capricious denial of the right to a trial.

2. Ito tacitly concedes that a new trial for Macro must mean a new trial for all defendants.

A new trial against Macro and MOE necessitates a new trial against all defendants (except Hirai, if reversal should be granted to Hirai on the grounds of the settlement agreement.) This is the only way to prevent inconsistent judgments./3/ Since the judgment is joint and several, it

cannot be based upon inconsistent findings with respect to different parties within the same judgment. (See Hirai's Opening Brief, pages 29-30.)

Ito does not contest this fact. Accordingly, should this court rule that Macro has a right to a trial, then a new trial must be granted as to all defendants.

It is probable that the CNMI Supreme Court sought to avoid the necessity of a new trial in the interest of expedience. Unfortunately, many of the problems in this lawsuit have arisen from overvaluing expedience and undervaluing fairness and careful application of the law. The defense respectfully looks to this court for full and fair enforcements of the parties constitutional rights which should not be sacrificed for expedience.

D. Violations of Substantive Due Process In Capricious, Arbitrary And Untenable Application Of The Law

1. Refusal to enforce contractual waiver and express assumption of risk.

The trial court ruled the obvious: The written contractual waiver and express assumption of risk signed by the decedent effectively bar plaintiff's claim pursuant to Restatement of Torts 2d 496B which is the law of the CNMI

/3/ Hirai pointed this out to the CNMI Supreme Court in his Brief in Opposition to Ito's Appeal requesting that a judgment be imposed on the previously dismissed defendants.

(7 CMC §3401.) The parties were surprised when the trial court, on reconsideration, committed clear error in ruling that the written waiver only applied to employers, and not to employees. Confident this would be overturned on appeal to the CNMI Supreme Court, the defense was once again surprised by the CNMI Supreme Court's clear error in finding that the Restatement of Torts 2d §496B "as generally applied" would not enforce this written waiver. Of course, that is simply not correct. The

CNMI Supreme Court's ruling that this waiver only applies where the defendants are not negligent makes the written waiver utterly devoid of meaning. Clearly, one does not require a written waiver when one is not negligent. The CNMI Supreme Court's construction would offer protection from liability only for those with no liability.

The decisions of both the trial court and the CNMI Supreme Court are so obviously result oriented as to be arbitrary, capricious and untenable applications of the law. As such, they are violative of substantive due process. As this court has found:

> "... [W]e may examine the CNMI Court's interpretation of CNMI law if that interpretation is "untenable or amounts to a subterfuge to avoid federal revue of constitutional violation." (Ferreira v. Borja 1 F 3d 960, 962 (9th Cir. 1993).

Certainly, the CNMI Supreme Court's action in this case meets that test.

2. The CNMI Supreme Court improper/erroneous standard of care in evaluating defendant's conduct.

The courts of the CNMI are bound by statute to follow the law of the Restatement as generally applied. (7 CMC 3401.) Nevertheless, the CNMI Supreme Court has refused to follow the Restatement of Torts 2d §299A as generally applied, with respect to application of a local standard of care. (Ferreira, supra.)

Hirai incorporates by reference the evidence, argument, and authority set forth in Yamageshi's Reply Brief to this court regarding the standard of care.

III.
CONCLUSION

For the forgoing reasons, defendant and appellant Nobuo Hirai respectfully requests that this court reverse the decision of the CNMI Supreme Court and order the dismissal of defendant and appellant Hirai from this action.

DATED:

Respectfully submitted,

GUDMUNDSON, SIGGINS, STONE & SKINNER

By:
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FRANCIS M. McKEOWN
Attorneys for Defendant
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END R

APPENDIX S

U.S. Court of Appeals Docket No.: 94-15186
Lower Court Docket No.: CV-92-00020

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RYOKO ITO, as Personal Representative of the Heirs of Akinobu Ito, Deceased

Plaintiff,

v.

MACRO ENERGY, INC., MARIANAS OCEAN ENTERPRISES, NOBUO HIRAI, SHIGEMI YAMAGISHI AND AMERICAN HOME ASSURANCE CO.

Defendants,

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

REPLY BRIEF OF DEFENDANTS AND APPELLANTS, MACRO ENERGY, INC. AND SHIGEMI YAMAGISHI

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INTRODUCTION

Appellants Shigemi Yamagishi and Macro Energy, Inc. hereby submit their Reply Brief in response to the Respondent's Brief filed on behalf of Appellee, Ryoko Ito.

ARGUMENT

I
THE ISSUES PRESENTED BY VIRTUE OF THIS APPEAL RAISE SUBSTANTIVE, CONSTITUTIONAL QUESTIONS.

Appellee, Ryoko Ito, maintains that this Court has no jurisdiction to evaluate the issues submitted for review because they arise solely from interpretations of local law. Contrary to Appellee's assertion, Macro Energy's right to a full and fair opportunity to be heard prior to being bound by a judgment is a cardinal principle of due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Matthews v. Eldridge, 424 U.S. 319 (1976); Blounder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313, 329 (1971).

In contrast to the case law cited by Appellee, responding papers, the focus of Macro Energy's initial argument is not upon the property right of which Macro Energy has been deprived but rather, the complete deprivation of Macro Energy's right to a full and fair opportunity to be heard prior to such deprivation as required by the due process clause of the United States Constitution. Therefore, Macro Energy's contention that its due process rights have been violated by the Supreme Court of the CNMI's decision binding it to the trial court judgment rendered after its dismissal, clearly invokes constitutional concerns.

Similarly, Macro Energy and Yamagishi's disputes with the Supreme Court of the CNMI's (1) interpretation of Section 496B of *Restatement of Torts*, 2d and (2) the application of an international as opposed to local standard of care in deciding Macro Energy and/or Yamagishi's liability, are based on constitutional rights guaranteed by the due process clause of the Fifth and Fourteenth Amendments. Implicit in the notion of fairness which is central to our legal system is the idea that if an interest being defended is of value, the defendant must be guaranteed, among other rights, a meaningful opportunity to be heard. Litigants must

be afforded the opportunity to be heard at a meaningful time and in a meaningful manner according to the Fifth and Fourteenth Amendments to the United States Constitution. Matthews v. Eldridge, supra, 424 U.S. 319.

On appeal, Macro Energy and Mr. Yamagishi contend that they were deprived of their right to a meaningful opportunity to be heard when the Supreme Court of the CNMI rendered judgment against them based upon erroneous and/or improper interpretations of governing legal principles.

More specifically, on the Release issue, Appellants contend that by interpreting the Release Agreement to provide no protection to Macro Energy or its employees, the Supreme Court rendered that agreement and the Appellants, right to rely upon the agreement, meaningless. As to the standard of care issue, evidence presented at trial established that Mr. Yamagishi's conduct in the course of scuba dive training/certification of Mr. Ito conformed with the applicable ADS standard. Nonetheless, the Supreme Court arbitrarily chose to evaluate Yamagishi's conduct under an international rather than the local standard in finding him liable for Ito's fatal injuries.

While the legal principles underlying the foregoing issues involve applications of local law, the thrust of Appellants' dispute is with the resulting violation of one of the prerequisites to due process of law guaranteed by the United States Constitution, the right to a reasonable and meaningful opportunity to be heard. Accordingly, the foregoing substantive constitutional issues clearly invoke this Court's jurisdiction to examine the claims presented for review.

II
THIS COURT RETAINS JURISDICTION TO REVIEW DECISIONS OF THE SUPREME COURT OF THE CNMI WHICH ARE BASED UPON UNTENABLE OR ARBITRARY INTERPRETATIONS OF LOCAL LAW.

Appellee has acknowledged that a judicially created exception exists to allow the Ninth Circuit to examine the Supreme Court of the CNMI interpretations of local law where that Court's interpretation of law is "untenable" or amounts to a "subterfuge to avoid federal review of a constitutional violation." Ferreira v. Mafnas, 1 F.3d 960 (9th Cir. 1993).

The Ninth Circuit is not precluded from evaluating and reversing interpretations of local law made by the Supreme Court of the CNMI where that interpretation is far fetched and/or untenable.

Without wavering from their contention that this appeal raises substantive constitutional issues, appellants contend that, at a minimum, this Court has jurisdiction to evaluate the disputed portions of the Supreme Court of the CNMI's decision based upon that court's untenable interpretation of legal principles including: (1) collateral estoppel; (2) the Restatement of Torts 2d; and, (3) the applicable standard of care.

A. The Supreme Court Of The CNMI Unreasonbly and Arbitrarily Applied The Doctrine Of Collateral Estoppel To Prevent Macro Energy From Litigating Its Defenses Against Appellee's Wrongful Death Claims.

Appellee maintains that the Supreme Court of the CNMI properly applied the doctrine of collateral estoppel to bind Macro Energy to the judgment rendered at the prior trial which proceeded against Yamagishi and Hirai but without Macro Energy's participation or attendance. Contrary to Appellee's broad interpretation, the doctrine of collateral estoppel is not without limitation and should only be applied where certain prerequisites are met. To properly apply the doctrine of collateral estoppel to deprive a party of their right to a full and fair opportunity to be heard, there must be a showing that (1) the party and non-party have either a sufficient commonality of interests in the prior litigation or (2) the non-party had effective control over the issues, theories or defenses litigated at the prior trial.

In support of her position, appellee relies upon various federal authorities including the case of Drier v. Tarpon Oil Co., 522 F.2d 199 (1975 5th Cir.). In Drier, the court found that the corporation's president was in privity with the corporation itself and therefore collaterally estopped from relitigating issues in its subsequent state court action. This conclusion was based not merely on the fact that Evans was the President and majority shareholder of Tarpon Corporation, but rather that in such a capacity, Evans made "ultimate decisions" in the litigation. Id. at 200. Therefore, the court concluded that Evans controlled the lawsuit and his interests were adequately represented therein.

The authorities cited by appellee are distinguishable since none dealt with a situation where the non-party had actually been dismissed from the lawsuit. In the case of a dismissal, the dismissed party has no fear of liability and therefore have little interest in the outcome of the litigation.

Authorities have observed that to have sufficient "control" over the litigation for purposes of collateral estoppel the non-party must have effective choice as to the legal theories to be advanced on behalf of the parties to the action. Hardy v. Johns-Mansville Sales Corp., 681 F.2d 334, 338 (5th Cir. 1982).

Macro Energy was dismissed from Appellee's litigation prior to trial due to the trial court's finding that the release agreement executed by Ito relieved Macro Energy of any and all liability for Ito's death. Accordingly, Macro Energy had no tangible interest in the outcome of the trial against Yamagishi and Hirai. Likewise, given this lack of interest, Macro Energy likewise did not exercise sufficient control over the course of litigation after its dismissal.

It is also noteworthy that while the Supreme Court of the CNMI found it necessary to remand the case against Marianas Ocean Enterprises to the trial court for further proceedings as to that entity's liability, it nevertheless chose to bind Macro Energy to the trial court judgment even though Macro Energy, like Marianas Ocean Enterprises, was not a party thereto. Therefore, this Court maintains jurisdiction to review the Supreme Court's arbitrary application of the collateral estoppel doctrine to deprive Macro Energy of its due process rights regardless of whether the issue is viewed as a question of local rather than federal law.

B. The Supreme Court Of the CNMI Improperly Interpreted Section 496B Of The Restatement Of Torts 2d In Finding That The Release Agreement Did Not Relieve Yamagishi And/or Macro Energy From Liability.

As noted in Appellants' Opening Brief, the majority of courts have held that to be effective, a release agreement need not enumerate every risk to be assumed by the releasor. Rather, a release such as that executed by Ito should be interpreted according to the true intent of the parties, that is, to relieve the releasee of liability for all reasonably foreseeable risks.

Madison v. Superior Court, 203 Cal.App.3d 589, 250 Cal.Rptr. 299 (1988). "Instructor negligence", which is alleged as the primary cause of Ito's death, heads the list of reasonably foreseeable risks of scuba diving. Id.

Contrary to widely accepted principles underlying the interpretation of Section 496B of the Restatement of Torts as set forth more fully in Appellants' Opening Brief,/1/ the Supreme Court of the CNMI adopted an unreasonably stringent interpretation of that section to find that Ito's release agreement did not shield Macro Energy and Yamagishi from liability. This finding rendered the Release Agreement illusory and was contrary to the clear intent of the parties as set forth more fully in Appellants' Opening Brief.

Therefore, even if the Supreme Court's decision as to the effectiveness of the Release Agreement constitutes a question of local rather than federal law, the Supreme Court's unreasonable interpretation of Section 496B clearly establishes the basis for this Court's jurisdiction to examine and reverse this untenable ruling.

/1/ Appellee's only dispute with such authorities is that they do not expressly cite to the Restatement. Nonetheless, those authorities all address the requirements under local and/or common law to create an effective "Release Agreement". Thus, the cited authorities implicitly if not explicitly adopt the principles underlying Section 496B of the Restatement of Torts, 2d.

C. The Supreme Court Of The CNMI Applied An Improper/Erroneous Standard Of Care In Evaluating Yamagishi's Conduct.

Appellee maintains that testimony of one of its rebuttal witnesses at trial, the President of the Northern Marianas Diving Operator's Association, demonstrated that dive shops throughout Saipan adhered to the CMAS International standard rather than the ADS standard of diving certification. However, a careful review of the testimony cited in

appellee's responding papers reveals that according to this witness, testimony, at least as many shops adhere to the ADS as the CMAS standard. (Appellee's Responding Brief, Supplement E.R. pp. 15-16).

Further, although Appellee's own scuba expert, Hugh Morrison, testified that CMAS set diving standards elsewhere in the world, (Appellants' Supplemental Excerpts of Records, pp1:/2/ RT Vol. VII p. 536: 17-20) he freely conceding that in Saipan and Japan, ADS provided the applicable standard for certifying divers. (Suppl. E.R. pp. 2-3; RT Vol. VII p. 550: 15-26;
p. 551: 1-13). Moreover, with respect to the level of training and the use of guides, Mr. Morrison admitted that the ADS standards were "uniquely Japan, Northern Marianas, and a few other places in the world . . ." (Suppl. E.R., p.4; RT Vol. VII, p.554: 5-24). Accordingly, the evidence and testimony presented by even Plaintiff and Appellee's own witnesses reveals that the

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/2/ Hereinafter referred to as "Suppl. E.R.".

Supreme Court of the CNMI's use of the International CMAS standard in evaluating Yamagishi and Hirai's conduct was both unreasonable and improper.

Principles of substantive due process guarantee that individuals will be free from arbitrary and capricious applications of the law. Accordingly, the Supreme Court violated Mr. Yamagishi's substantive due process rights by arbitrarily applying an international standard of care.

To the extent that this Court is persuaded by appellee's arguments that the standard of care issue addressed in Appellants' Opening Brief is solely a question of local law rather than a constitutional concern, this Court nevertheless has jurisdiction to evaluate and overturn the CNMI's untenable decision on this issue.

III
CONCLUSION

Appellants, Macro Energy and Shigemi Yamagishi, respectfully request that this Court reverse the Supreme Court of the CNMI's decision in pertinent part and remand this case to the trial court level and afford these parties their constitutional right, of which they have been deprived by the CNMI courts, for a full and fair hearing on the substantive issues presented for review.

Respectfully submitted this 17th day of June, 1994.

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END S

APPENDIIX T

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYOKO ITO, as Personal Representative of the Heirs of Akinobu Ito, Deceased,	)	No. 94-15186
Plaintiff-Appellee,)	)	DC# CV-92-00020 Northern Marianas Is.
vs.	)	
MACRO ENERGY, INC., et al.,	)	
Defendants-Appellants	)	
RYOKO ITO, as Personal Representative of the Heirs of Akinobu Ito, Deceased,	)	No. 94-15188
Plaintiff-Appellee,	)	DC# CV-92-00020 Northern Marianas Is.
vs.	)	
MACRO ENERGY, INC.,	)	ORDER
Defendant,	)	
and	)	
NOBUO HIRAI,	)	
Defendant-Appellant.	)	

Before: FARRIS, KOZINSKI, and NOONAN, Circuit Judges

Appellants' motions for stay pending appeal are denied. Moreover, because this is not a case "involving the Constitution, treaties, or laws of the United States," these appeals are dismissed for lack of appellate jurisdiction. 48 U.S.C. 1694c(a); Sablan v. Manglona, 938 F.2d 970 (9th Cir. 1991).

FILECOPY

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
121 Spear Street, P. O. Box 193939
San Francisco, CA 94105-3939

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date on the attached decision of the Court. If the decision is by opinion, judgment was entered as of the decision date printed on the slip opinion.

PETITION FOR REHEARING (FRAP 40)

Filing Time: A petition for rehearing may be filed within fourteen (14) days after judgment.

Purpose: A petition should only be made to direct the Court's Attention to one or more of the follow-in situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which appears to have been overlooked by the panel.

3. An apparent conflict with another decision of the Court which was not addressed in the opinion.

Petitions which merely reargue the case shall not be filed.

Statement of Counsel: A petition shall contain an introduction stating them in counsel's judgment, one or more of the situation described above (in Purpose Section) exist. The points to be raised must be clearly stated. Lacking such a statement, the petition will not be filed.

Form: The fifteen (15) page limit allowed by the rule must be observed. Please use 8 1/2 x 11 inch paper. Three (3)

copies of the petition and the original are required
UNLESS the petition includes a suggest for rehearing en banc. If it does,
thirty-three (33) copies and the original must be filed.

The petition must be directed to the Clerk of Court, contain an original signature of the counsel/pro per litigant submitting the petition and indicate complete proof of service to all parties.

BILL OF COSTS (FRAP 39) (LOCAL RULE 14)

If a party is allowed costs, the bill of costs must be filed within fourteen (14) days of entry of judgment. (See attached form for additional information.)

ISSUANCE OF MANDATE (FRAP 41)

The mandate issues twenty-one (21) days after entry of judgment unless the Court directs otherwise. A TIMELY petition for rehearing will stay the issuance of the mandate. If the petition is denied, the mandate will issue seven (7) days later. If a stay of mandate is sought, an original and three (3) copies of the motion must be filed.

PETITION FOR WRIT OF CERTIORARI

For information concerning the filing of this petition, refer to the Rules of the Supreme Court of the United States. Appointed counsel should refer to Section 4(c) of the Appendix to the Rules of the United States Court of Appeals for the Ninth Circuit with regard to the obligation to file a petition for certiorari.

Attachment
END T